A TREATISE

ON THE

APPLICATION OF PAYMENTS

BY DEBTOR TO CREDITOR;

BEING A

COMPLETE COMPILATION OF THE LAW PERTAINING TO THE RIGHTS OF DEBTOR AND CREDITOR RESPECTIVELY;

AND ALSO GIVING THE

VARIOUS RULES FOR THE GUIDANCE OF THE COURTS WHEN NO APPROPRIATION HAS BEEN MADE BY THE PARTIES.

BY

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PREFACE.

THE actual professional wants of the author furnished the suggestion of writing this book.

Having occasion, a short time ago, to make a pretty thorough examination of the principles regulating the application of payments by debtor to creditor, he found the learning upon the subject in a very fragmentary condition.

He discovered that not only was there no separate treatise embodying the law in clear and concise form, but even that there was not any systematic and exhaustive collection of its doctrines and rules anywhere.

A chapter, of greater or less length, in some work comprising a wide range of subjects, where none received more than a general treatment; a note in some book of cases displaying more or less industry in collecting the authorities, but without much attempt at method or arrangement, and one or two magazine articles, summed up all that had been written upon the subject. For any further investigation recourse must be had to the digests or to the reports themselves.

It seemed as if this was hardly the condition that a branch of the law should be in which has held a position of considerable prominence for more than a hundred and fifty years in the English courts, and, from the very first, in the courts of this country—the cases on which are numbered far into the hundreds. It seemed as if there

was room for a work which should go considerably farther than any has as yet proceeded, and which should lay before the practitioner and the student all that is interesting or useful to know upon this topic.

It is apprehended that no plea in support of the value of a study of this subject is necessary.

Every business man or individual charged with the management of property of his own or of others, ought to have correct general notions in regard to it; whilst every practising lawyer should possess an accurate knowledge of its origin and history, and a thorough insight into all its rules and principles.

More especially is this necessary in commercial communities where the transactions among men are more varied and complex than in simpler states of society, and where the questions arising out of business dealings become more and more complicated and subtle for the practitioner.

It will be noticed, in looking through the following pages, that the cases vary in number and importance with the greater or less commercial character of the community.

The law upon this subject is *general*, and has in it no features of local custom or local statutory regulations. Wherever the common-law system is in vogue, the decisions here given should be as good authority as in the country or State where they were rendered. The doctrines to be found in these pages are as applicable in the United States as in Great Britain, in Canada as in New York; and ought to possess the same force and receive the same deference in Maine as in Texas, in Virginia as in California.

In the preparation of this treatise, the author has placed nothing before him as a model to which he has endeavored to make this conform, either in manner of arrangement or

style of execution. In the nature of things, had he been so inclined, he could hardly have done it.

The subject is a peculiar one, *sui generis*, and must needs receive exceptional treatment. The origin of the law is anomalous; and the discussion, amounting at times to a controversy, which has attended its progress through confusion and discrepancy to a state of comparative settlement and symmetry, is unlike the history of any other branch of the law.

The controlling thought with the author has been to give clearly this origin and this history, and also, in their logical order and arrangement, the principles of this system as they have been at last settled or are in process of settlement. It has been his "end and aim" to lead the reader and the student up to a commanding spot, where, with mental eye, they can take in all these points with as clear an impression as can one, with physical eye from an eminence, survey at a single glance, all the features of a variegated landscape before him.

If the author has measurably succeeded in his design, or if, having failed, as he may well have done, his effort shall be the means of inciting others to present the subject in the form it deserves, he will be amply rewarded for his labors.

ROCHESTER, October, 1879.

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THE

APPLICATION OF PAYMENTS.

CHAPTER I.

PRELIMINARY OBSERVATIONS.

THE LAW in regard to the application of payments, although now comparatively settled and uniform, shows more confusion and discrepancy among the authorities, especially the earlier ones, than any other branch of the law.

A writer in the American Law Magazine, some years ago, thus spoke of it: "No part of the law exhibits, perhaps, such painful uncertainty as that relating to the application of payments made to a creditor by one indebted on various accounts. The student may pause, and after wearying himself over this confusion, turn at length in despair to a more promising chapter. Not so the anxious practitioner, who, in his midnight examination, knows that the morning must find him prepared to assume at least an air of confidence. The judge, too, in the high responsibility of

passing upon momentous interests, often seems driven, after turning over the books, to the *sortes virgilianæ*, and adopts the dictum on which his faded vision may chance to rest."[1]

This is highly drawn, and somewhat overdrawn; but, in the main, is substantiated by judges themselves.

Sir William Grant, in his celebrated opinion in Clayton's case (1 Merivale, 528–607), after collating the authorities very carefully, and finding them about evenly divided upon diametrically opposite sides of the question, said: "The cases then set up two conflicting rules—the presumed intention of the debtor, which, in some instances, at least, is to govern—and the *ex post facto* election of the creditor, which, in other instances, is to prevail. I should, therefore, feel myself a good deal embarrassed if the general question of the creditor's right to make the application of indefinite payments were now necessarily to be determined."

In Stone *v.* Seymour (15 Wend. 19), Chancellor Walworth commenced his elaborate opinion by remarking that upon examination he had been surprised that there did not appear to be any settled rules, except in two or three cases, as to the application of indefinite payments, where the creditor had different claims against his debtor, either in England or in the United States, or in those countries whose

[1] 1 Am. Law Mag. 31.

general principles of jurisprudence were based upon the rules of the Roman or civil law.

Judge Cowen, in the course of his oft-quoted decision in Pattison *v.* Hull (9 Cow. 747), observed that the point in contention was one about which English and American chancellors and judges differed and doubted, and that he himself had found two cases directly contradictory of one another in the same book (Vernon), within a few years of each other!

The same diversity of decision was discovered about the same time by Judge Poland, of Vermont,[1] and Judge Wheeler, of Texas,[2] and in a recent case before the Supreme Court of New Jersey,[3] it was said that the application of payments seemed to be a subject about which it was difficult to find general principles in the books to guide our practice.

This contrariety of opinion and conflict of decision are owing to the fact that the body of the common law on this subject has been borrowed, and at the same time certain parts of the system thus borrowed have been stoutly contested and finally repudiated, and other rules substituted in their place.

In the main, the doctrines have been taken from the civil law, but certain features of that code have been discarded. The resultant system is neither a wholly new system, nor the former one entire, but a

[1] Pierce *v.* Knight, 31 Vt. 701.

[2] Stanley *v.* Westrop, 16 Texas, 200.

[3] White *v.* Trumbull, 3 Greene, 314.

sort of composite system, through which may be caught at times glimpses of the civil law, and at other times views of a new and different jurisprudence.

For a full comprehension and appreciation of the new system, a thorough understanding of the civil law is essential.

CHAPTER II.

THE CIVIL LAW.

THE entire text of the body of the Roman law in regard to the imputation of payments:[1]

Article 1.

The debtor of several debts acquits whichsoever of them he pleases.—If a debtor who owes to a creditor different debts, hath a mind to pay one of them, he is at liberty to acquit whichsoever of them he pleases, and the creditor cannot refuse to receive payment of it. For there is not one of them which the debtor may not acquit, although he pay nothing of all the other debts; provided he acquit entirely the debt which he offers to pay.

Article 2.

Payments are applied to the debts at the choice of the debtor, and in his favor.—If, in the same case of a debtor who owes several debts to one and the same creditor, the said debtor makes a payment to him, without declaring at the same time which of the debts he has a mind to discharge, whether it be that he gives him a sum of money indefinitely in part of payment of what he owes him, or that there be a

[1] 1 Domat's Civil Law, by Strahan, 905, Cushing's edition.

compensation of debts agreed on between the creditor and debtor, or in some other manner, the debtor will have always the same liberty of applying the payment to whichsoever of the debts he has a mind to acquit. But if the creditor were to apply the payment, he could apply it only to that debt which he would discharge in the first place, in case he were the debtor. For equity requires that he should act in the affairs of his debtor as he would do in his own. And if, for example, in the case of two debts, one of them were controverted and the other clear, the creditor could not apply the payment to the debt which is contested by the debtor.

Article 3.

The payment is applied to the debt which it is most advantageous for the debtor to acquit.—In all the cases where a debtor owing several debts to one and the same creditor, is found to have made several payments of which the application has not been made by the mutual consent of the parties, and where it is necessary that it be regulated either by a court of justice or by arbitrators, the payments ought to be applied to the debts which lie heaviest on the debtor, and which it concerns him most to discharge. Thus, a payment is applied rather to a debt of which the non-payment would expose the debtor to some penalty, and to costs and damages, or in the payment of which his honor might be concerned, than a debt of which the non-payment would not be attended with such conse-

quences. Thus, a payment is applied to the discharge of a debt for which a surety is bound, rather than to acquit what the debtor is singly bound for without giving any security, or to the discharge of what he owes in his own name, rather than of what he stands engaged for as surety for another. Thus, a payment is applied to a debt for which the debtor has given pawns and mortgages, rather than to a debt due by a simple bond or promise; rather to a debt of which the term has already come, than to one that is not yet due, or to an old debt before a new one; and rather to a debt that is clear and liquidated, than to one that is in dispute, as to a pure and simple debt before one that is conditional.

Article 4.

The overplus of a payment after the discharge of one debt is to be applied to the others.—When a payment made to a creditor to whom several debts are due, exceeds the debt to which it ought to be applied, the overplus ought to be applied to the discharge of the debt which follows, according to the order explained in the preceding article, unless the debtor makes another choice.

Article 5.

A payment is first applied to the discharge of the interest.—If a debtor makes a payment to discharge debts which of their nature bear interest, such as that of a marriage portion, or what is due by virtue

of a contract of sale, or the same be due by the sentence of a court of justice, and the payment be not sufficient to acquit both the principal and interest due thereon, the payment will be applied, in the first place, to the discharge of the interest, and the overplus to the discharge of a part of the principal sum.

Article 6.

And that even although the acquittance should mention both principal and interest.—If, in the cases of the foregoing article, the creditor had given an acquittance in general for principal and interest, the payment would not be applied in an equal proportion to the discharge of a part of the principal and of a part of the interest; but, in the first place, all the interest due would be cleared off, and the remainder would be applied to the discharge of the principal.

Article 7.

How the price of what is pawned or mortgaged for several articles is to be applied.—When a debtor obliging himself to a creditor for several causes at one and the same time, gives him pawns or mortgages for the security of all the debts, the money which is raised by the sale of the pawns or mortgages will be applied in an equal proportion to the discharge of every one of the debts. But if the debts were contracted at divers times, upon the security of the same pawns and mortgages, so as that the debtor had mortgaged for the last debts what should remain of the

pledge after payment of the first, the moneys arising from the pledges would, in this case, be applied, in the first place, to the discharge of the debt of the oldest standing. And both, in the one and the other case, if any interest be due on account of the debt which is to be discharged by the payment, the same will be paid before any part thereof be applied to the discharge of the principal.

CHAPTER III.

THE COMMON LAW.

HAVING thus set out the Roman law, we turn to the rule as it is now acted upon in the courts of Great Britain, and most of the States of this country, which may, in general terms, be formulated as follows:

1. Where money is paid by a debtor to his creditor, the debtor has a right to make the appropriation to which account he pleases.

2. If the debtor make no appropriation, then the creditor may apply it to the satisfaction of any demand which he has against his debtor, at his own pleasure.

3. If neither party make any such application, then, if there be various debts due to the creditor, the court will make the application according to its own view of the law and equity of the case, under all the circumstances.[1]

This rule, it will be seen, has three main branches. These we will consider separately in their order, with such modifications, limitations and exceptions as have been engrafted upon them.

It may also be said in this connection, that this rule is of equal application in courts of equity and of law.[2]

[1] 2 Greenl. Ev. § 529. Bell's Law of Scotland, paragraph 562.

[2] Merrimack Co. Bk. *v.* Brown, 12 N.H. 320; Thompson *v.* Phelan, 2 Fost. 339.

CHAPTER IV.

FIRST PRINCIPAL RULE.

If both debts are due at the time of the partial payment, the debtor is at liberty to apply the payment to which he pleases.[1] *Solvitur in modum solventis.*

[1] Stone *v.* Seymour, 15 Wend. 19; Pattison *v.* Hull, 9 Cow. 747; Allen *v.* Culver, 3 Den. 284; N. Y. Life & Trust Co. *v.* Howard, 2 Sand. Ch. 183; Briggs *v.* Williams, 2 Vt. 283; Bacon *v.* Brown, 1 Bibb, 334; Howland *v.* Rench, 7 Blackf. 236; Baine *v.* Williams, 10 S. & M. 113; Bosley *v.* Porter, 4 J. J. Marsh. 621; Brady *v.* Hill, 1 Mo. 315; White *v.* Trumbull, 3 Green, 314; Selleck *v.* Sugar Hollow Turnpike Co. 13 Conn. 453; Starrett *v.* Barber, 7 Shep. 457; Boutwell *v.* Mason, 12 Vt. 608; McDonell *v.* Montgomery, 20 Ala. 313; Hargroves *v.* Cooke, 15 Geo. 321; Matossy *v.* Frosh, 9 Tex. 610; Ordinary *v.* McCollum, 3 Strobh. 494; Caldwell *v.* Wentworth, 14 N. H. 431; Semmes *v.* Boykin, 27 Geo. 47; Wetherell *v.* Joy, 40 Me. 325; Thayer *v.* Denton, 4 Mich. 192; Cremer *v.* Higginson, 1 Mason, 323; Anon. Cro. Eliz. 68; Pinnel's Case, 5 Rep. 117; Peters *v.* Anderson, 5 Taunt. 596; Gwinn *v.* Whitaker, 1 Har. & J. 754; Allston *v.* Contee, 4 Id. 351; Simson *v.* Ingham, 2 B. & C. 65; Gaston *v.* Barney, 11 Ohio St. 506; Crisler *v.* McCoy, 33 Miss. 445; Solomon *v.* Dreschler, 4 Minn. 278; Irvin *v.* Paulett, 1 Kan. 418; Forelander *v.* Hicks, 6 Ind. 448; King *v.* Andrews, 30 Ind. 429; Nutall *v.* Banin, 5 Bush, 11; Horne *v.* Planters' Bk. 32 Geo. 1; Pennypacker *v.* Umberger, 22 Penn. St. 492; Croft *v.* Lumley, 27 L. J. Q. B. 32; Waugh *v.* Wren, 11 Weekly Rep. 244; Whitaker *v.* Groover, 54 Geo. 174; Killorin *v.* Bacon, 57 Id. 497; Jones *v.* Williams, 39 Wis. 300; Champenos *v.* Fort, 45 Miss. 355; Fargo *v.* Buell, 21 Iowa, 292; Howard *v.* McCall, 21 Gratt. 205; Leef *v.* Goodwin, Taney, 460; Plummer *v.* Erskine, 58 Me. 59; Bonnell *v.* Wilder, 67 Ill. 327; Bayley *v.* Wynkoop, 5 Gilm. 449; Jackson *v.* Bailey, 12 Ill. 159; Martin *v.* Draher, 5 Watts, 544; Moor-

This leading and elementary principle of the civil has been adopted in its entire length and breadth by the common law, and has been applied and enforced in its fullest integrity.

One of the oldest cases in the books, is Anon. Cro. Eliz. 68, which was debt upon a bond. The facts were that the defendant owed to the plaintiff certain money upon a bond, and certain money for wares sold, as it appeared by his books. At the day of payment upon the bond, he tendered the money according to the bond. The plaintiff accepted it, and said it should be for the debt due by his book, and not for the other debt; but the defendant said he paid it upon his bond, and not otherwise, and the plaintiff crossed his book, pretending the book debt to be discharged, and brought debt upon the bond, and it was adjudged against him, for the payment, it was said, is to be in the manner that the defendant would pay it, and not according to the words of the plaintiff how he would receive it.

In Bois *v.* Canfield (Style, 239), it was said by Roll, Ch. J., that if any one pay money in satisfaction of an obligation, and the party to whom it is paid saith that he will receive it for another cause, yet, if he receive it, it shall be adjudged to be paid in satisfaction of the obligation, for he must receive upon such terms as the other will pay it.

"Always the manner of the tender and of the

head *v.* West. Br. Bk. 3 W. & S. 550; Stewart *v.* Keith, 12 Penn. St. 238; Birky *v.* McMakin, 64 Id. 348.

payment shall be directed by him who makes the tender or the payment, and not by him who accepts it."[1]

"It is not material how or in what manner the defendant received or accepted it, but how the other paid it, for *quicquid solvitur, solvitur secundum modum solventis.*"[2]

This absolute right of appropriation in the debtor according to Redfield, J., in Boutwell *v.* Mason (12 Vt. 608), "results from one of the most obvious principles of human action, that a free agent may annex such conditions to an offer as he sees fit, and he who accepts the offer takes it subject to those conditions."[3]

It is forcibly expressed by Mr Baron Channel, in a very recent case in the court of Queen's Bench, "The party paying the money had, in my judgment, a clear

[1] Pinnel's Case, 5 Rep. 117.

[2] Colt *v.* Nettervill, 2 P. Wms. 308.

[3] A cognate power in the law of donations or gifts is exemplified in the amusing and celebrated "Wheel of Fortune" case, which occured in Lord Cowper's time. One Mr. Cornwallis, having set up a lottery called "The Wheel of Fortune, or a Thousand Pounds for a Penny," Mrs. Fuller, wife of Dr. Fuller, sent for twenty-four of those tickets, and gave them among the servants, upon condition if twenty shillings or more should come up, her daughter should have a moiety of the prize, and one of them thus given to her foot-boy came up a prize of £1,000. The daughter brought this bill for the moiety, and it was undeniably proved by the rest of the servants and others, that the ticket which cost but one penny was given to the foot-boy on that condition. Lord Cowper: "*Cujus est dare, ejus est disponere.*" The foot-boy is an infant, but he is bound by the conditions, as well as one of full age. He may be a trustee, and is a trustee to £500 for the young lady. Decree accordingly. Burnet, IV, 141.

right to appropriate it. He distinctly paid the money as rent. He refused to pay it otherwise than as rent. Mr. Martilli refused in language to receive it as rent, but he did take it. What he did and not what he said, was, in my humble opinion, the all-important matter. He should have declined to take the money at all if he meant to elect to proceed for a forfeiture."[1]

It extends even to the payment of illegal claims.

"The debtor has, in the first instance, the right to apply the payment in reduction of any claim whatever. The claim may be one which the law will not enforce. It may be in violation of its provisions, and the party paying may have the right to recover back. Still the money must be applied by the party receiving it, as the debtor when making the payment shall direct."[2]

This unrestricted power of appropriation will be further illustrated by giving a few instances in which it has been maintained.

A party having two unpatented surveys of land, may elect to which a payment of money shall be applied, so as to procure a patent.[3]

A debtor owing a debt, consisting of principal and interest, and making a partial payment, has a right to direct its application to so much of the principal in

[1] Croft *v.* Lumley, 27 L. J. Q. B. 321.

[2] Per Appleton. in Treadwell *v.* Moore, 34 Me. 112.

[3] Taylor *v.* Talbot, 2 J. J. Marsh. 49.

exclusion of the interest, and the creditor, if he receives it, is bound to apply it accordingly.[1]

This right applies to a fund which the creditor receives for the debtor, as well as to a payment which the debtor makes the creditor[2]—to payments made by an execution debtor to a sheriff holding different executions against him; in such a case he may direct on which execution the payment shall apply[3]—to money placed in the hands of an agent to pay two notes equally due by a debtor, and such money cannot be appropriated to the payment of one of the notes at the option of the creditor.[4]

In the case cited from 5 Leigh (*supra*), A. owed a debt to B., payable on demand, for which C. was A.'s surety, and A. assigned debts of others to B. in part payment, and after such assignment, but before the assigned debts were collected, A. contracted another debt to B. for which there was no security: *Held*, that B. could not, after collection of the assigned debts, apply the same to the payment of A.'s last debt contracted after the assignment was made, and recover the whole amount of the first draft from C., the surety. The Court said: "Although the payment be not made in money, it is equally clear that the property, or evidence, or whatever it may be that is assigned in

[1] Pindall *v.* Bk. of Marietta, 10 Leigh, 481; Miller *v.* Trevilian, 2 Rob. (Va.) 1; Howard *v.* McCall, 21 Gratt. 205.

[2] McDonald *v.* Pickett, 2 Bailey, 617; Donally *v.* Wilson, 5 Leigh, 329.

[3] Adams *v.* Crimager, 1 McMullan, 309.

[4] Jones *v.* Perkins, 29 Miss. 139.

payment, must go towards paying the existing debt, and not a debt the existence of which the parties could not, without the gift of prophecy, have dreamed at the time."

Where a debtor owed two notes, a small one and a large one, and paid money with directions to apply part of the amount in payment of the small note and the balance upon the large one, and the creditor applied the whole upon the large note, it was held that this action of the creditor was unauthorized and illegal, and that the small note must be considered as paid;[1] and in Jackson *v.* Bailey (12 Ill. 160), it was said that the creditor is not at liberty to disregard the appropriation made by the debtor, and apply the money on another debt; that the application could not be changed without the consent of the debtor.

This right of the party paying cannot be thwarted even by one having the appearance of some authority in the case.

Thus, a surety on a note gave money to the principal debtor, and directed him to pay the note with it, and the principal took it to the holder and told him it was the surety's money sent to pay the note. The holder, however, declined receiving it on the note, but took it in payment of another demand against the principal, to which appropriation the principal ultimately assented: *Held*, that the holder must be deemed to have received the money in payment of the note.[2]

[1] Boutwell *v.* Mason, 12 Vt. 608.

[2] Reed *v.* Boardman, 20 Pick. 441.

The Court said: "It is a well settled rule of law that a party paying money, even where there are several accounts between him and the receiver, has the right to direct on what account it shall go; and if at the time of the payment any direction is given as to the appropriation, the receiver, by accepting it, is bound by the appropriation, and cannot apply it to any other purpose. Here the money was sent with distinct notice that it was Boardman's money, sent to discharge that note, being the only note on which Boardman was liable to the plaintiff, and the only debt due from Boardman to the plaintiff. Although he at first refused to accept it, and for aught appears continued to refuse, yet by the act of accepting it he was bound to receive it on account of that note, and he is precluded by law from averring that he received it on any other. Wasson was a mere agent or messenger to carry the money and give notice of the purpose for which it was sent. This was made known to the plaintiff, and he had no authority to alter the appropriation and apply it to the payment of his own other debts, and his assent to such change of the appropriation was wholly void as against the party who sent the money."

Neither is it lost by the creditor obtaining possession of the debtor's money without his consent (not by legal proceedings), and the debtor will not be bound by an application made by the creditor under such circumstances; hence where a debtor intrusted

funds to an agent with directions to apply them by way of compromise in satisfaction of two demands held against him by the same person, and the creditor, knowing this fact, levied an attachment on the money so intrusted to the agent, and also on the money of the agent, all of which had been deposited to the credit of the agent, and thereupon the agent, in order to regain possession of his own money, assented, under protest, to the application of the debtor's money to one of the debts which was unsecured, it was held that the application thus made was not binding upon the debtor, and that he might afterwards, when sued by the same party creditor, apply the money to another debt at his option.[1]

This general right of appropriation by the debtor is not affected by the other party being a creditor in a fiduciary character, as an executor, a trustee, &c.[2]

Such application may be accomplished by an advance agreement, or by acts anticipatory of the receipt of the money by the creditor, and in such a case will be equally efficacious with a direction given at the time of payment.

Thus A. demised to B. certain premises, and by the terms of the lease B. was bound to pay the rents to C. to apply on certain claims therein particularly specified. Within the year C. agreed to receive B.'s note for specific amounts in lieu of the balance of the

[1] Dennis *v.* Jones, 31 Miss. 606.

[2] Miller *v.* Trevilian, 2 Rob. (Va.) 1.

rents, which notes were given and paid without any further direction from A.: *Held*, that the stipulation in the lease, from which B. derived his authority to pay C., was an appropriation of the payments subsequently made, and C. was bound to credit them accordingly.[1]

So if there be an agreement or understanding between the parties that payments made to, or moneys received by, the creditor shall be applied in a certain way or on certain accounts, the debtor has a right to insist upon the application as specified.[2]

Thus D., for the purpose of paying B., to whom he was indebted, drew drafts on A. for the amount, and procured A.'s acceptance of them by giving him security, and then, by an arrangement understood between all of the parties, shipped produce to A. to be sold by him on commission, and the proceeds to be applied on the drafts: *Held*, that A., on realizing from sales of the produce, could not apply such moneys on an old account which D. was owing him.[3]

A similar ruling was made in the Court of Exchequer.[4]

A somewhat complicated case, calling for the application of this principle, arose in Massachusetts. A debtor gave his creditor a mortgage of his personal property to secure a balance of account. The deal-

[1] Smith *v.* Wood, Saxton, 74.

[2] Yates *v.* Hoppe, 9 C. B. 541.

[3] Sproule *v.* Samuel, 4 Scam. 135; Stackpole *v.* Keay, 45 Me. 297.

[4] Walker *v.* Rostron, 9 M. & W. 411.

ings of the parties afterwards continued, and the debtor, on being pressed for payment on account, told the creditor that he would endeavor to pay him for the articles he had received after the mortgage was given, and keep the subsequent accounts paid up, but that as the creditor had security on the former part of the accounts, he must wait for payment of that part. The debtor afterwards made payments from time to time which were credited to him generally on the creditor's book, and which exceeded the amount that was due when the mortgage was given, but were less than the amount of the articles afterwards furnished to him by the creditor. At the time when these payments were made, the creditor considered them as made towards the payment of the articles furnished to the debtor subsequently to the mortgage. The creditor sold part of the mortgaged property, and took part thereof to his own use, but the property so taken by him, and the money received on the sale, were not sufficient to discharge the balance due to him when the mortgage was given: *Held*, that the payments made after the giving of the mortgage, although credited generally on the creditor's book, might be applied by him towards payment of the subsequent accounts, and that he was not chargeable in the process of foreign attachment as trustee of the debtor, by reason of his retaining part of the mortgaged property, and the proceeds of the sale of the other part thereof.[1] Hub-

[1] Capen *v.* Alden, 5 Metc. 268.

bard, J., said: "Whether the facts which existed when the trustee received the mortgage, and his own view of the subsequent payment, would constitute an appropriation by him of the mortgaged property and its proceeds, is not free from doubt, but coupled with the statement by him to Alden shortly after the making of the mortgages, when he was pressing Alden for money on account, we are of opinion that an appropriation was made by consent of Alden to the balance due at the time the mortgages were taken, and that, by agreement of the parties, the subsequent payments were appropriated to the reduction of the account for articles furnished after the mortgages were made."

And the giving a draft for money and directing the application of the money when received on it, has been held to be the same as handling the money itself, and as constituting a valid application.[1]

And generally any amount, either in money or in property, which, by agreement between the parties, or by direction of the debtor, was received by the creditor to be applied on a specified demand, is *pro tanto* a discharge of it.[2]

If there be an agreement between the parties that the debtor shall perform labor, and that it shall be

[1] Moorhead *v.* West Branch Bk. 3 Watts & S. 550; Hollond *v.* Teed, 7 Hare, 50; Buchanan *v.* Findlay, 9 B. & C. 738; Can Powder Co. *v.* Burly, 9 Up. Can. C. P. 290.

[2] Cramer *v.* Willetts, 61 Ill. 481; Hansen *v.* Rounsavell, 74 Id. 238.

applied on a certain contract, after performance the creditor cannot apply it to another contract.[1] Though in the face of such an agreement, the conduct of the parties may be such as to require the application of the moneys very differently from the original understanding. Thus, in Black *v.* Shooler (2 McCord, 293), the parties made an agreement that the one should work for the other by the month, and that the monthly wages should apply on a note which the laborer owed the other. In fact, during the service, the creditor advanced the other party, at his request, small sums from time to time, which, in the aggregate, amounted to the value of the services: *Held*, that the circumstances constituted a rescission of the original agreement to apply the wages on the note, and that the advances by the creditor must be deemed to have been made upon the faith of the fund of the monthly wages.

So, payments made by a debtor under a letter of advice from the creditor that they will be applied to the later items of account, thus reversing the legal order of appropriation as settled in Clayton's Case (which we shall consider hereafter), must be so applied.[2]

A verbal direction from the directors of a bank to the cashier, without any recorded vote of the board, is a sufficient authority to guide him in the application of moneys officially received by him.[3]

[1] Martin *v.* Draher, 5 Watts, 544.

[2] Merriman *v.* Ward, 1 John & H. 371.

[3] Stamford Bk. *v.* Benedict, 15 Conn. 437.

It follows that where a prior agreement has been made between the parties on the subject of appropriation, the powers of the parties in that regard have become merged or absorbed in the agreement. Thus, H. was indebted to T. in three accounts, and an agreement was executed by which the amounts of the three demands were settled, and T. agreed to accept in satisfaction of all three demands, a smaller sum to be paid in installments. H. paid one installment, and failed to pay anything further, and T. proceeded to enforce his rights. Lord Romilly held that the creditor might appropriate as he chose. This ruling was reversed on appeal, and it was decided that the payment must be applied to the three debts ratably.[1] Sir G. Mellish, L. J., said: "I do not think that such a case comes within the ordinary rule in Clayton's Case, that if a debtor owes a creditor several debts and makes payments and does not appropriate them to any one of the debts more than the other, then the creditor may appropriate them. That assumes, first of all, that the debtor has a right to appropriate at the time, and that, if he does not do it, then the creditor has a right to do it. Now could any such appropriation have been made here?" And his lordship proceeded to demonstrate that the application was a matter of anterior agreement between the parties.

[1] Thompson *v.* Hudson, 6 Law Rep. Chan. App. Cas. 320.

CHAPTER V.

LIMITATIONS, MODIFICATIONS, AND EXCEPTIONS, TO THE FIRST PRINCIPAL RULE.

I.

This intention must be manifested at the time of payment.[1]

This is the language of the rule as generally expressed, yet it has been held that a formal declaration of his intention need not be made by the debtor at the very moment of making the payment; that it was sufficient if it could be collected from other circumstances that he intended, at the time of payment, to appropriate it to one account specifically;[2] or if these were circumstances known to the creditor, clearly indicating the intention of the debtor, or tending to raise a fair presumption what it would be:[3] but held, in the same case, that waiting from April 13th to August 17th was too long for the debtor to exercise his election.

It has been held, also, that the debtor cannot postpone the assertion of his right of appropriation until

[1] Wilkinson *v.* Sterne, 9 Mod. 427; Manning *v.* Westerne, 2 Vern. 607; Stone *v.* Seymour, 15 Wend. 19; Moss *v.* Adams, 4 Ired. Eq. 42; Reynolds *v.* McFarlane, 1 Overt. 488; White *v.* Trumbull, 3 Green, 314; Boutwell *v.* Mason, 12 Vt. 608.

[2] Sawyer *v.* Tappan, 14 N. H. 352.

[3] Carpenter *v.* Goin, 19 N. H. 479.

the trial. Thus, a person holding several notes payable to himself and others, and also a note as agent of B., the payee (all of which notes were made by the same persons), received payment in part from the makers, nothing being said as to the appropriation of the payment. In a suit afterwards brought by B. on the note of which he was payee, it appeared that no part of said payment had been specifically applied to any of the notes: *Held*, that the defendants could not, on the trial, claim that any part of said payment should be applied to the note sued on.[1]

It has been held, also, that it is too late for him to wait until suit brought, and then attempt an application by plea of set-off.[2]

II.

This intention need not be expressly declared by the debtor, but may be manifested by, or inferred from, circumstances,[3] *and may, in a proper case, be referred to the jury as a question of fact.*[4]

[1] Taylor *v.* Jones, 1 Cart. 17.

[2] Peters *v.* Anderson, 5 Taunt. 596.

[3] Robert *v.* Garnie, 3 Cai. 14; Poindexter *v.* La Roche, 7 S. & M. 699; Robinson *v.* Doolittle, 12 Vt. 246; West. Br. Bk. *v.* Moorhead, 5 Watts & S. 542; Terhune *v.* Colton, 1 Beasley, 232; Shaw *v.* Picton, 7 Dow. & Ry. 201; Scott *v.* Fisher, 4 Mon. 387; Tayloe *v.* Sandiford, 7 Wheat. 13; Mitchell *v.* Dall, 4 Gill & J. 361; Peters *v.* Anderson, 5 Taunt. 596; Seymour *v.* Van Slyck, 8 Wend. 403; Snell *v.* Cottingham, 72 Ill. 124; Waters *v.* Tompkins, 2 C. M. & R. 723; Berrian *v.* Mayor, 4 Rob. (N. Y.) 538.

[4] West. Br. Bk. *v.* Moorhead, 5 Watts & S. 542; Fawke *v.* Bowie, 4 Har. & J. 566; Waters *v.* Tompkins, 2 C. M. & R. 723.

The expression of a wish by the debtor, how the payment should be applied, will amount to a direction to that effect.[1]

The amount of the payment exactly corresponding to one of the debts, would be such a circumstance;[2] a positive refusal to pay one debt and an acknowledgment of another debt, with a delivery of the sum due upon it, would also be a sufficient circumstance of this description.[3] Such a circumstance would be, the taking of a receipt from the creditor, expressing the debt on which the payment was to apply.[4]

Thus, also, if the creditor held but one debt against the debtor, or held one that was admitted, and other claims that were disputed and not admitted as debts, and there were no circumstances attending the payment to repel the presumption, a jury would be authorized to infer that the debtor appropriated the payment to the single debt in the one case, or to the undisputed one in the other.[5]

A party paid money to another who held a note against him personally, and also held notes against an estate of which the party paying was administrator, and took a receipt expressing that the money was received on note: *Held*, that these circumstances indi-

[1] Hansen *v.* Rounsavell, 74 Ill. 238.

[2] Robert *v.* Garnie, 3 Cai. 14; Newmarch *v.* Clay, 14 East, 239.

[3] Tayloe *v.* Sandiford, 7 Wheat. 13.

[4] Stewart *v.* Keith, 12 Penn. St. 238; Ordinary *v.* McCollum, 3 Strobh. 494.

[5] Armistead *v.* Brooke, 18 Ark. 521.

cated an intention to pay upon the personal debt, and that it should be so applied.[1]

Taking a receipt "in full of all demands," when the earlier indebtedness is barred by the statute of limitations, is a strong case for the implication of a direction by the debtor that the creditor should apply it to the later indebtedness.[2]

An intention to apply a payment upon an illegal claim, as for usurious interest, may be manifested by circumstances the same as in the case of a legal claim, and the question may, if necessary, be left to the jury.[3]

If enough of the payments made on an account be subsequently applied by the creditor to liquidate the items for liquor illegally sold, and a statement of the account omit therefrom the liquor items, and their equivalent credits be sent to the debtor, who thereupon replies that he will pay the same, the appropriations will be deemed made by mutual assent, and they cannot be revoked without such assent.[4]

III.

The direction for the application must be made to the creditor, or the circumstances from which it is to be inferred must be communicated to him, or known

[1] Sawyer *v.* Tappan, 14 N. H. 352.

[2] Berrian *v.* Mayor, 4 Rob. (N. Y.) 538.

[3] Rohan *v.* Hanson, 11 Cush. 44.

[4] Plummer *v.* Erskine, 58 Me. 59.

by him, otherwise there will be no valid application.[1]

A. indebted by specialty, and also a simple contract, pays several sums and enters them in his book on account of what was due by the specialty. The entries are not sufficient to make the application.[2]

Upon the same principle, it has been held that it is not sufficient that the party making the payment credits it to a particular account in his own books, of which the other party has no notice.[3]

And the sending a message by the principal debtor to one of his sureties, that he had made the payment on a certain item without any communication of this wish or intention to the creditor, or any knowledge of it on his part, is not an application of the payment by the debtor.[4]

IV.

It is hardly necessary to add that the act claimed or relied upon as constituting an application by the debtor, must be one emanating from or authorized by him, and not the proceeding of some other party to which he is not privy, or of which he is not cognizant.

Thus, the mere fact that a payment with the

[1] Terhune *v.* Colton, 1 Beasley, 232.

[2] Manning *v.* Westerne, 2 Vern. 607.

[3] Heilbron *v.* Bissell, 1 Bailey Eq. 430; Frazer *v.* Bunn, 8 C. & P. 704.

[4] Hill *v.* Southerland, 1 Wash. (Va.) 128.

debtor's money was made to a creditor having several demands against the debtor, by one who was a security of the debtor for one of the debts, is not a sufficient circumstance on which to base an inference that the debtor intended it should be applied to the debt of which such agent was the guaranty.[1]

V.

The debtor, in making this appropriation, must pay the whole of any debt which is then due and payable, and cannot claim the right to extinguish it only partially.[2]

But where a debtor paid what was computed by the creditor as the amount due on a note he owed, and stated that he paid the money on that note, it must be so applied on the note although it falls somewhat short of the amount due on the note, and it cannot afterwards be refused on that note on the ground that it was a partial payment, and be applied by the creditor on another indebtedness.[3]

VI.

There is still another limitation on the debtor's power of appropriation, stated in some of the cases, viz., that he cannot pay principal only on a debt which car-

[1] Mitchell *v.* Dall, 4 Gill & J. 361.

[2] Stone *v.* Seymour, 15 Wend. 19.

[3] Runyon *v.* Latham, 5 Ired. Law, 551.

ries interest, leaving interest unpaid although overdue, for every payment towards such debt, say the courts holding this doctrine, shall be first applied to keep down the interest then due.[1]

But there are cases also the other way on this proposition.[2]

The question was discussed at considerable length by Chief Justice Moore, of the Supreme Court of Texas, in Tooke *v.* Bonds (29 Texas, 419): "When," said he, "the claim of the debtor is a single debt, consisting of principal and interest, the debtor certainly cannot, as a matter of right, make partial payments and appropriate them to the extinguishment of the principal in advance of the discharge of the interest. If he were permitted to do so, he could, without the consent of the creditor, change the legal effect of the contract by which the unpaid balance, not including interest, bears interest until the entire debts are discharged. But there is no reason why this may not be done with the mutual assent of the parties. And although the creditor is not bound to accept such partial payment, yet, if the debtor makes it upon the stipulation and agreement that it shall be applied in satisfaction of the principal, and not of the interest,

[1] Union Bk. *v.* Kendrick, 10 Rob. (La.) 51; Tracy *v.* Wikoff, 1 Dall. 124; Norwood *v.* Manning, 2 Nott. & McCord, 395; Dean *v.* Williams, 17 Mass. 417.

[2] Pindall *v.* Marietta, 10 Leigh, 481; Miller *v.* Trevilian, 2 Rob. (Va.) 1.

and it is so accepted and appropriated by the creditor, the principal is thereby discharged and extinguished, and the creditor cannot be permitted, without the consent of the debtor, to shift the application of such payment from the principal to the interest, nor will the law do so for him."

VII.

Lastly, this right of appropriation by the debtor, applies only to voluntary payments, and does not exist in the case of payments in invitum, *or by process of law.*[1]

It is also probably a personal right that is limited to the debtor himself, and does not survive him and pass to his administrator. In U. S. *v.* Wardwell (5 Mason, 82), Judge Story said he doubted exceedingly whether an administrator of a debtor was subrogated to the rights of appropriation which the debtor himself would have if living, and that he especially doubted it if the estate were insolvent.

[1] Blackstone Bk. *v.* Hill, 10 Pick. 129; Larrabee *v.* Lambert, 32 Me. 97; Cowperthwaite *v.* Sheffield, 1 Sand. (S. C.) 416.

CHAPTER VI.

SECOND PRINCIPAL RULE.

Where the debtor does not manifest his intention as to the application of the payment, the creditor may apply it to any demand then due and payable which he pleases. "Recipitur in modum recipientis." [1]

[1] Stone *v.* Seymour, 15 Wend. 19; Pattison *v.* Hull, 9 Cow. 747; Allen *v.* Culver, 3 Den. 284; Mann *v.* Marsh, 2 Cai. 99; Hutchinson *v.* Bell, 1 Taunt. 558; Dawson *v.* Remnant, 6 Esp. N. P. C. 24; Jones *v.* Kilgore, 2 Rich. Eq. 63; Brady *v.* Hill, 1 Mo. 315; Smith *v.* Screven, 1 McCord, 368; McFarland *v.* Lewis, 2 Scam. 344; White *v.* Trumbull, 3 Green, 314; Selleck *v.* Sug. Hol. Turnpike Co. 13 Conn. 453; Starrett *v.* Barber, 7 Shep. 457; Cremer *v.* Higginson, 1 Mason, 323; Wilkinson *v.* Sterne, 9 Mod. 427; Goddard *v.* Cox, 2 Strange, 1194; Peters *v.* Anderson, 5 Taunt. 596; Logan *v.* Mason, 6 Watts & S. 9; Hargroves *v.* Cooke, 15 Geo. 321; Caldwell *v.* Wentworth, 14 N. H. 431; Matossy *v.* Frosh, 9 Texas, 610; Crisler *v.* McCoy, 33 Miss. 445; Boutwell *v.* Mason, 12 Vt. 608; Campbell *v.* Hodgson, 1 Gow, 74; Simson *v.* Ingham, 2 B. & C. 65; Shaw *v.* Picton, 4 Id. 715; Woolley *v.* Jennings, 2 C. & P. 144; Frazer *v.* Bunn, 8 Id. 704; Plomer *v.* Long, 1 Stark. 153; Hutchinson *v.* Bell, 1 Taunt. 558; Chitty *v.* Naish, 2 Dowl. P. C. 511; Rosseau *v.* Cull, 14 Vt. 83; Sawyer *v.* Tappan, 14 N. H. 352; Hilton *v.* Burley, 2 N. H. 193; Hillyer *v.* Vaughan, 1 J. J. Marsh. 583; Nash *v.* Hodgson, 31 Eng. L. & Eq. 555; Beau *v.* Brown, 54 N. H. 395; Gaston *v.* Barney, 11 Ohio St. 506; Marryatts *v.* White, 2 Stark. 101; Whitaker *v.* Groover, 54 Geo. 174; Killorin *v.* Bacon, 57 Geo. 497; Jones *v.* Williams, 39 Wisc. 300; Horne *v.* Planters' Bk. 32 Geo. 1; King *v.* Andrews, 30 Ind. 429; Nutall *v.* Brannin, 5 Bush, 11; Pierce *v.* Knight, 31 Vt. 701; Bird *v.* Davis, 1 McCarter, 467; Middleton *v.* Frame, 21 Mo. 412; Solomon *v.* Dreschler, 4 Minn. 278; Fargo *v.* Buell, 21 Iowa, 292; Champenois *v.* Fort, 45 Miss.

Lord Chancellor Cowper stated the rule thus, in Manning *v.* Westerne (2 Vern. 606): "Athough the rule is that *quicquid solvitur, solvitur secundum modum solventis*, yet that is to be understood when, at the time of payment, he that pays the money declares upon what account he pays it, but if the payment is general, the application is in the party who receives the money."

By not exercising the power when he parted with the money, the debtor allows the right of appropriation to devolve on the creditor, and submits to his exercise of it, if the latter will do it at all, and, it would seem, could not claim therefore to resume it.[1]

The broad language was used in one case, that if anything had been settled by decision, it was that the right to apply a payment, without restriction as to anything but the time, devolves on the creditor in default of application by the debtor.[2]

The latest form of the rule with which we have met is that by Field, J., in Hooper *v.* Keay (1 Law Rep. [Q. B. Div.] 178), as follows: "The law on this subject is clear. A debt *prima facie solvitur modo*

355; Marshall *v.* Sloan, 26 Ark. 513; Plummer *v.* Erskine, 58 Me. 59; Howard *v.* McCall, 21 Gratt. 205; Chapman *v.* Com. 25 Id. 721; Waterman *v.* Younger, 49 Mo. 413; Johnson *v.* Anderson, 30 Ark. 745; Leef *v.* Goodwin, Taney, 460; Sprague *v.* Hazenwinkle, 53 Ill. 419; Bonnell *v.* Wilder, 67 Ill. 327; Arnold *v.* Johnson, 1 Scam. 196; McFarland *v.* Lewis, 2 Id. 344; Hansel *v.* Rousavell, 74 Ill. 238; Hamilton *v.* Benbury, 2 Hayw. 385; Berrian *v.* Mayor, 4 Rob. (N. Y.) 538.

[1] Moss *v.* Adams, 4 Ired. Eq. 42.

[2] Logan *v.* Mason, 6 Watts & S. 9.

solventis, but if the debtor makes a payment, and there are two debts to which it may be appropriated if no *modus solvendi* is pointed out by the debtor, then the rule applies, and the payment *recipitur modo recipientis*."

In the exercise of this right, where there are distinct accounts and a general payment, the creditor may apply such payment to which account he pleases:[1] on an open account, although he has a judgment older than the account;[2] to whichever debt he pleases, whether the party paying be individually indebted on several accounts, or be individually indebted and also jointly indebted with another,[3] and the application on the joint account will be upheld, even though a receipt has been given only in the name of the party paying.[4] He may also apply it to the debt not secured by property or sureties, when not prohibited by other rules of appropriation, as where a factor made advances on goods, and, before he had received the proceeds of any sales thereof, brought an action against his principal and attached his property to secure the amount advanced, and afterwards made further advances on the same goods according to the original consignment: *Held*, that the factor might apply the proceeds of the goods, as they were received, towards

[1] Bodenham *v.* Purchas, 2 B. & Ald. 39.

[2] Watt *v.* Hock, 25 Penn. St. 411; Van Sickle *v.* Ayres, 2 Halst. Ch. 29; Chitty *v.* Naish, 2 Dowl. P. C. 511; Brazier *v.* Bryant, Ib. 477.

[3] Van Rensselaer's Exrs. *v.* Roberts, 5 Den. 470.

[4] Van Rensselaer's Exrs. *v.* Roberts (*supra*).

the discharge of the sums advanced after the action was commenced.[1]

In Hall *v.* Wood[2] (tried at the Sittings at Westminster, Hil. 1785), Lord Mansfield, Ch. J., also laid down the rule that a payment might be applied to any part of a debt, where the creditor had several parts due to him from the party making the payment, unless it be particularly specified, at the time, to which part it is to be applied.

Kirby *v.* Marlborough (2 M. & S. 18) is a leading authority on the creditor's right of appropriation. A. and B. executed a bond to enable A. to carry on his trade, conditioned for the payment of all such sums, not exceeding £300, which should at any time thereafter be advanced by the plaintiffs. It was held that payments made generally to the plaintiffs on the account of A. might be applied by them in liquidation of a balance existing against A. before the execution of the bond, and that B. could not insist upon their being applied in exoneration of his liability on the bond, although, at the time of his entering into it, the plaintiffs did not give him notice that any balance was then existing against A.

Brewer *v.* Knapp (1 Pick. 332) was similar in principle to this. A., by indenture, leased a house to B. as principal, and C. and D. as sureties. B. entered and occupied after the expiration of the term, and he

[1] Upham *v.* Lefavour, 11 Metc. 174.

[2] Note *a* to Newmarch *v.* Clay, 14 East, 239.

paid money after that time without appropriating it, and it did not appear whether it was paid before or after rent had become due for the second year. It was held that A. might apply it to the rent which accrued after the expiration of the term, although the sureties were liable for the first year, and not afterwards.

The payment may be ascribed by the creditor to a prior and purely equitable debt, and the debtor be held for a subsequent legal debt.[1]

The application may be made by the creditor through his agent, as his book-keeper;[2] or by an attorney of the creditor, who may make the application for his client.[3]

In the case last cited the Court said: "It is true that payment was not made to a creditor having several claims, but to the attorney of several creditors. The cases, however, seem to fall within the same principle, except that, in a case like the present, a duty may attach to any election that may devolve upon the attorney in favor of the client, if either is entitled to priority."

The creditor can make application at his option, where there are several debts, even though some of the debts be guaranteed and some not,[4] as he may

[1] Bosanquet *v.* Wray, 6 Taunt. 597.

[2] Matossy *v.* Frosh, 9 Texas, 610.

[3] Carpenter *v.* Goin, 19 N. H. 479.

[4] Clark *v.* Burdett, 2 Hall, 197.

apply the payment to the earliest items in his account against the debtor.[1]

Where a dealer with a bank had a balance to his credit upon a general cash account, and died indebted to it by judgment and upon simple contract, it was adjudged that the bank had a right, independent of the statute of set-off, to apply the balance to the latter debt.[2] It is, however, rather a question of set-off than of application of payments, as the money lying in bank constitutes a debt owing by the bank, rather than a payment by the debtor to the bank on account.

This general right of appropriation by a creditor, as here expounded, holds in regard to a bankrupt debtor under the bankrupt laws of England, and a creditor is entitled to apply an unappropriated payment in discharge of whatever liability of such debtor he may think fit.[3]

The creditor can exercise his election upon any debts which he holds that are not positively illegal, even if he could not support an action upon them, either because the law, without prohibiting the contracting of such a debt, has declared that no action shall be maintained upon it, or because a right of action once existing has been barred.

Thus a creditor receiving payments from his debtor,

[1] Walther *v.* Wetmore, 1 E. D. Smith, 7.

[2] State Bk. *v.* Armstrong, 4 Dev. 519.

[3] Grigg v. Cocks, 4 Sim. 438.

without any direction as to their application, may apply them to a debt on which the statute of frauds does not allow an action to be maintained, as a promise to pay for the past and future board of the child of another,[1] or upon a claim for a higher rate of interest than the law allowed in Canada, but which, though non-enforceable, was not illegal.[2]

And an unappropriated payment may be credited by the receiver upon a demand against which the statute of limitations has run.[3]

Such an appropriation, however, will not have the effect to take the debt out of the operation of the statute.[4] It seems to be regarded as a mere permission of law to the creditor thus to apply it, and not an intentional payment on that account, which is necessary to involve the admission of the whole debt, and the implied renewal of the promise to pay it. The debtor is not presumed to have intended to renew a promise which is no longer legally binding upon him, although he has put it in his creditor's power to satisfy *pro tanto* a claim upon which he had lost his legal remedy.[5]

If, however, a payment be thus applied by the

[1] Haynes *v.* Nice, 100 Mass. 327.

[2] Fraser *v.* Locie, 10 Grant. Ch. 207.

[3] Mills *v.* Fowkes, 5 Bing. N. C. 455; Williams *v.* Griffiths, 5 M. & W. 300; Armistead *v.* Brooke, 18 Ark. 521; Crisler *v.* McCoy, 33 Miss. 445.

[4] Nash *v.* Hodgson, 31 Eng. L. & Eq. 555; Pond *v.* Williams, 1 Gray, 630.

[5] Ramsay *v.* Warner, 97 Mass. 8.

creditor before the statute has run against the claim, it will have the full effect of a direct payment by the debtor, that is, of extending the time just so much for the barring of the demand by the statute.[1]

This is owing to the distinction which, in many respects, is recognized between debts barred by the statute and those not thus barred.[2]

And when a debtor makes a payment which is applicable to debts of the former kind, he will be held to intend the full effect of a payment.[3]

But an attorney who has several demands against his client, some of which are barred, has no right to appropriate, in payment of the demands so barred, a sum received by him on account of his client for damages recovered in an action.[4] *Per* Tindal, Ch. J.: "This is not the case of a payment at all, but of a sum of money received without the knowledge of the defendant. Therefore, inasmuch as the latter never had the power of exercising any election as to the application of this sum, the right of the plaintiff to appropriate it never arose."

A creditor has likewise been allowed to credit a general payment upon a bill of exchange which was void for want of a stamp.[5]

And in a case in which an attorney had claims

[1] Ramsay *v.* Warner (*supra*).

[2] Pond *v.* Williams (*supra*).

[3] Ramsay *v.* Warner (*supra*).

[4] Wallace *v.* Lacy, 1 Man. & Gr. 54.

[5] Biggs *v.* Dwight, 1 Man. & Ry. 308.

against a corporation for services, some of which he could enforce, and others he could not for want of a valid appointment, and money was paid him generally on account, it was held that he might appropriate such payments to the latter claims.[1]

In Crookshank *v.* Rose (5 C. & P. 19), and Phillpott *v.* Jones (2 Ad. & Ell. 41), it was adjudged that moneys paid generally might be applied by the creditor to an account for spirits sold in small quantities to the debtor, although such demand was not recoverable according to the statute of 24 Geo. II, c. 40, but the sale was not prohibited, and that the creditor might enforce the other collectible demands that he held. In the case last cited, Taunton, J., said: "The spirits in this case have been excluded from the verdict. The rule is that if a debtor pays money on account, and does not at the time state how it is to be applied, the creditor may make the application. Here the £17 were paid without any application to particular items of the account. The plaintiff then might apply that payment to the items in question, and he was not bound to tell the defendant at the time that he made such application; he might make it any time before the case came under the consideration of a jury. There is, therefore, no 'action maintained,' or 'recovery' for the spirits in this case, according to the terms of the statute, and there is no provision in the act that a party, having been paid

[1] Arnold *v.* Poole. 4 Man. & Gr. 860.

for spirits supplied in the quantities there mentioned, shall be liable to refund. The defendant, if he wished to avail himself of the act, should have appropriated the payment at the time he made it." Williams, J.: "The objection is that this action may be considered as brought for the particular part of the account to which the statute would apply, but the defendant has disarmed himself of this objection by not appropriating the payment when he made it. The payment having been made on account of the spirits is valid; he could not have brought an action to recover the money back."

Upon this reasoning, the intimation of the Court, in Huffstater *v.* Hayes (64 Barb. 573), that the items in the plaintiff's account were such as he could not discharge by the appropriation thereto of a general payment by the debtor, is perhaps questionable. The sale of the spirits was not illegal, but the enforcement of the claim at law was simply prohibited.

There are many ways in which the application by the creditor may be evidenced. It may be by entry in his books,[1] and for that purpose his account books, together with evidence that the entries were made at the time they bear date, are competent evidence in his favor;[2] but it has been said that the application is not complete until the fact of such entry has been communicated to the other party.[3]

[1] Cole *v.* Trull, 9 Pick. 325.

[2] Van Rensselaer's Exrs. *v.* Roberts, 5 Den. 470.

[3] Simson *v.* Ingham, 2 B. & C. 65; Sawyer *v.* Tappan, 14 N. H. 352.

In an old case, the account books of the plaintiff's testator were admitted in evidence to prove the application, in which entries were made about a fortnight after the receipt of the money, and thirteen or fourteen years before suit brought.[1] But the account books of the creditor showing an application of the payment on one claim against the debtor, are not evidence on the part of the creditor to contradict the testimony of the debtor as to his application of it on another claim.[2]

As between an entry by the creditor in his books appropriating a payment to a certain account, and a prior receipt given by him to the debtor appropriating it to another account, the receipt is controlling.[3]

And, on the other hand, as between a mere entry in the debtor's book of application one way, and satisfactory evidence as to an agreement between the parties at the time of payment of application another way, the latter will prevail.[4]

This intention may also be manifested by bringing suit, as where a creditor holding two notes against a party, receives from him a general payment, and commences suit on one of the notes, this will constitute an appropriation of the payment on the other note;[5] or, by bringing suit, coupled with the manner of

[1] Wilkinson *v.* Sterne, 9 Mod. 427.

[2] Pennypacker *v.* Umberger, 22 Penn. St. 492.

[3] *Per* Ld. Brougham, in Fraser *v.* Birch, 3 Knapp, 380.

[4] Bird *v.* Davis, 1 McCarter, 467.

[5] Starrett *v.* Barber, 7 Shep. 457; Haynes *v.* Waite, 14 Cal. 446.

separating and stating the accounts which the creditor rendered the debtor, and to which he made no objection.[1]

In another case, it was held that the commencement of a suit, and the continuance of it under certain circumstances, evinced an intention to make application on a demand other than the one in suit.

Thus, a debtor, owing several different notes, assigned certain property to his creditor as collateral security for their payment. The creditor brought suit on one of the notes, and afterwards received enough money from the assigned property to pay the note on which suit had been commenced, but another of the notes had in the meantime matured. The creditor continued to prosecute the action, and it was held that such conduct on his part constituted an election to appropriate the money received by him from the assigned property to the note on which suit had not been commenced.[2]

Where, also, a debtor owed two notes maturing at different times, and the creditor had brought suit on the first note, and on the day the second note matured the debtor made a general assignment, the fact that the creditor afterwards took judgment on the first note for its full amount was held to show an election on his part to apply the payment to the second note.[3]

[1] Upham *v.* Lefavour, 11 Metc. 174.

[2] Allen *v.* Kimball, 23 Pick. 473.

[3] Bobe *v.* Stickney, 36 Ala. 482.

Or, lastly, it may be by giving a receipt specifying the way the payment was to be applied.[1]

And, generally speaking, it may be evidenced by circumstances as well as in the case of an appropriation by the debtor.[2]

[1] Smith *v.* Wood, Saxton, 74; Brown *v.* Brabham, 3 Ham. 275; Otto *v.* Klauber, 23 Wisc. 471.

[2] Snell *v.* Cottingham, 72 Ill. 124; *per* Bosanquet, J., in Mills *v.* Fowkes, 5 Bing. N. C. 455.

CHAPTER VII.

LIMITATIONS, MODIFICATIONS AND EXCEPTIONS TO THE SECOND PRINCIPAL RULE.

The right of application which the creditor enjoys is not so unrestrained as in the case of the debtor, nor so broad even as the preceding chapter would seem to indicate, but is subject to vastly many more limitations and exceptions.

"The right of the creditor to apply the payment is not unlimited," said McKinney, J., in Bussy *v.* Grant (10 Humph. 238). "It is not always essential that there should have been an express declaration by the debtor, at the time of the payment, to which of two accounts he intends the money to be applied. There are cases in which, though the payment be general, the creditor is not allowed to apply the payment to which account he pleases," and which would render the exercise of such discretion on the part of the creditor unreasonable, and enable him to work injustice on his debtor.[1]

[1] Arnold *v.* Johnson, 1 Scam. 196.

I.

It cannot be exercised in the case of demands which are positively illegal.

This right of application was said, by the Supreme Court of Vermont, "to be limited, however, to legal demands, the payment of which could be enforced against the party paying, and not to claims such as an account for spirituous liquors sold in violation of the statute."[1]

A similar doctrine has been held in Massachusetts. "This right of application by the creditor," said Dewey, J., in Rohan *v.* Hanson (11 Cush. 44), "has been allowed in the case of demands not recoverable at law, where no prohibitory statute existed against them, but will not embrace contracts which are forbidden by law under heavy penal forfeitures, or payments which may at once be recovered back from the party receiving them because illegal. In such cases, when no application has been made by the debtor and there are two demands, one legal and the other illegal, the payment is to be applied to the legal demand to the exclusion of the illegal. The right of the creditor, therefore, to apply a payment made generally to such demand as he elects, extends only to lawful demands."

But the creditor need not, as a part of his case,

[1] Bancroft *v.* Dumas, 21 Vt. 456; Caldwell *v.* Wentworth, 14 N. H. 431.

prove that he had a license to sell the liquors, the burden of proof being on the objector.[1]

For the same reason a creditor will not be permitted to ascribe a general payment upon illegal usurious items or claims.[2]

Nor to a debt for which the debtor is not responsible, as paying the debt of another for example.[3]

It is otherwise, however, where usury is not illegal, but simply non-recoverable.[4]

II.

The claims of the creditor must also be definite, and existing demands, concerning which there is no contingency either as to their character or the time of payment.

There must be no dispute between the parties as to the amount due upon, or the validity of, the contract to which the creditor has applied the payment made by the debtor, or else such facts must be established at the trial. "To allow a creditor to apply payments thus made," was said in one case, "to a debt which he claimed to have against the debtor, but the existence of which the debtor denied, would be to compel him to pay, perhaps, a fraudulent claim which

[1] Kidder *v.* Norris, 18 N. H. 532.

[2] Duncan *v.* Helm, 22 La. Ann. 418; McAlister *v.* Jerman, 32 Miss. 142; Gill *v.* Rice, 13 Wis. 549.

[3] Burland *v.* Nash, 2 Fost. & Fin. 687.

[4] Shelton *v.* Gill, 11 Ohio, 417; Baggs *v.* Loudenback, 12 Id. 153; Rains *v.* Scott, 13 Id. 115; Graham *v.* Cooper, 17 Id. 605.

the creditor had set up against him without the possibility of defending against it."[1] But it was asserted *e contra.* by Crawford, J., of the Supreme Court of Georgia, in McLendon *v.* Frost (57 Geo. 448), that the creditor, in appropriating a payment not applied by a debtor, might credit it on a just and valid demand, whether the correctness of such demand be assented to or not by the debtor.

The claims upon which the creditor makes application must at the time be due and payable.[2]

He cannot apply it to a debt not then payable and demandable, if there be another debt then due;[3] nor partly on debts then due and partly on debts not then due;[4] nor retain it in his hands to apply upon a future indebtedness, leaving a prior demand unpaid;[5] nor, where he has an existing claim against the debtor, apply the payment to extinguish his contingent liability on a note which he has indorsed for him.[6]

Advances made on account generally for work done under several distinct contracts, some of which have not been completed, must be applied in the first

[1] Stone *v.* Talbot, 4 Wisc. 442.

[2] Heintz *v.* Cahn, 29 Ill. 308.

[3] Effinger *v.* Henderson, 33 Miss. 449; Sturges *v.* Robbins, 7 Mass. 301; Stone *v.* Seymour, 15 Wend. 19; Heintz *v.* Cahn, 29 Ill. 308; Bacon *v.* Brown, 1 Bibb. 334; Stamford Bk. *v.* Benedict, 15 Conn. 437; Law *v.* Sutherland, 5 Gratt. 357; Bobe *v.* Stickney, 36 Ala. 482.

[4] Cloney *v.* Richardson, 34 Mo. 370.

[5] Baker *v.* Stackpoole, 9 Cow. 420; Parks *v.* Ingram, 2 Fost. 283.

[6] Niagara Bk. *v.* Rossevelt, 9 Cow. 409.

place to the amounts due on the contracts which have been completed, and not on those which have not been completed.[1]

III.

As to the time for the creditor to make the appropriation.

Upon this point there is great antagonism among the cases.

The English judges pretty generally extend a very large authority to the creditor.

One of the older cases held that it would do for the creditor to make the application any time after a general payment, so that he does it before an account settled between them.[2]

Sir William Grant, in Clayton's case,[3] reviewed the decisions, and, although he expressed no opinion himself, he found there was "certainly a great deal of authority for the doctrine that the creditor may at any time elect how the payments made to him shall retrospectively receive their application."

In Mills *v.* Fowkes,[4] Chief Justice Tindal, declared that it had been held, in Simson *v.* Ingham, that the creditor might appropriate at any time before action, and Coltman, J., in the same case, remarked

[1] McDowell *v.* Blackstone Canal Co. 5 Mason, 11.

[2] Wilkinson *v.* Sterne, 9 Mod. 427.

[3] 1 Merivale, 610.

[4] 5 Bing. N. C. 455.

that it was not necessary to decide whether the creditor should make the appropriation within any limited time because there had been no unreasonable delay, but that the more correct view, however, seemed to be that the creditor was not limited in point of time.

Lord Denman, in Phillpott *v.* Jones,[1] used the broad language, that "the defendant having made no appropriation, the plaintiff therefore might elect, at any time, to appropriate it to this part of his demand;" and Taunton, J., was equally liberal, declaring that the defendant "might make the appropriation any time before the case came before the consideration of a jury."

In a recent case,[2] Blackburn, J., adhered to the rule as thus expressed, employing very explicit language for the purpose: "If the debtor does not appropriate the payment the creditor has a right to do so to any debt he pleases, and that not only at the instant of payment, but up to the very last moment."

Other judges, however, have not subscribed to this doctrine.

Best, J., in Simson *v.* Ingham (2 B. & C. 65), seemed disposed to give the creditor a reasonable time only for deciding to which account he would place a sum of money that had been paid him, without any application by his debtor, and Lord Chief Justice Tindal, in Smith *v.* Wigley,[3] laid down the doctrine

[1] 2 Ad. & Ell. 41.

[2] City Disc. Co. *v.* McLean, 9 Law Rep. (C. P.) 692.

[3] 3 Moore & Scott, 174.

as narrowly as any partisan of the civil law could ask. "In the absence of appropriation by the debtor," said he, "the creditor must make the appropriation at the time the money comes to his hands," and in Howard & Dolman's case,[1] it was held that where moneys have been paid by a company to its solicitors, on account of costs generally, the solicitors have no right, *post litem motam*, to make a special appropriation of the payments.

By the law of Scotland, the creditor is treated as leniently as by the most liberal English doctrines, being allowed to make his election "at the last hour," by which we understand even upon the trial,[2] while in Canada some limitation at least is imposed on the creditor's right, for, in a recent case,[3] it is said to be too late for him to wait until the very day of bringing the account into the master's office.

In this country great contrariety of decision and opinion appears.

Some judges say that the creditor must make the application at the time of receiving the payment.[4] Others, that he must make a recent application by entries in his books, and not keep parties and sureties in suspense, changing their situation from time to time as his interests, governed by events, might dictate.[5]

[1] 1 Hem. & Mill, 433.

[2] Campbell *v.* Dent, 2 Moore's P. C. C. 292.

[3] Fraser *v.* Locie, 10 Grant. Ch. 207.

[4] Stone *v.* Seymour, 15 Wend. 19; U. S. *v.* Bradbury, Davies, 146.

[5] Hill *v.* Southerland, 1 Wash. (Va.) 128; Logan *v.* Mason, 6 W. & S. 9.

While others still have taken the broad ground that he may make the application at any time[1]—"at the time of payment or at any subsequent time."[2]

In a case in South Carolina,[3] it was held, that he could do so by his answer after suit brought, and Chancellor Harper said: "My conclusion is, on the preponderance of authority, that the creditor has an unlimited right to appropriate when the debtor has made no appropriation at the time of payment."

There are many authorities, however, between these two propositions; some ruling that the creditor will be allowed a reasonable time;[4] but that it is too late to wait until the trial;[5] or until after suit brought;[6] or until a controversy has arisen between the parties.[7]

A recent case in New Jersey,[8] laid down the doctrine that it would suffice for the creditor to take action "at any time, except that it must be to a debt existing at the time of payment, and before the cir-

[1] Pattison *v.* Hull, 9 Cow. 747; Hill *v.* Brady, 1 Mo. 315; Alexandria *v.* Patten, 4 Cranch, 317.

[2] Howard *v.* McCall, 21 Gratt. 205; Plummer *v.* Erskine, 58 Me. 59.

[3] Heilbron *v.* Bissell, 1 Bailey Eq. 430.

[4] Allen *v.* Culver, 3 Den. 284; Briggs *v.* Williams, 2 Vt. 283; Harker *v.* Conrad, 12 S. & R. 301; White *v.* Trumbull, 3 Green, 314; Starrett *v.* Barber, 7 Shep. 457.

[5] Harker *v.* Conrad (*supra*); White *v.* Trumbull (*supra*).

[6] Moss *v.* Adams, 4 Ired. Eq. 42; Callahan *v.* Boazman, 21 Ala. 246; Whetmore *v.* Murdock, 3 W. & M. 390; Richards *v.* Columbia, 55 N. H. 96.

[7] Robinson *v.* Doolittle, 12 Vt. 246; Milliken *v.* Tufts, 31 Me. 497.

[8] Terhune *v.* Colton, 1 Beas. Ch 312.

cumstances of the parties interested are in any way changed, but that with this limitation it was important that the creditor's right should be maintained," while, in an equally late case in New York,[1] it was said, by Mr. Justice Talcott of the Supreme Court, to be " too late, after the creditor had kept an account in a general debit and credit form, to attempt, for the first time, upon the trial of the cause, to divide up the items and apply the payments to different classes."

Under this head, a somewhat peculiar case arose in South Carolina. A principal was indebted to his factor for distinct debts by judgment, and also by mortgage. It was held that the factor was entitled to retain the proceeds of the crops in his hands, without making any application until it could be ascertained, by a sale of the mortgaged property, whether it would be sufficient to pay the mortgage debt, and if it were not, that he might then apply the proceeds to the unpaid balance of the mortgage debt, and the residue to the judgment, and that the right of the factor to make such application was not affected by an intermediate assignment, by the principal, of his entire estate for the benefit of his creditors.[2]

The whole question received quite a discussion at the hands of Chief Justice Hemphill, of the Supreme Court of Texas, in Taylor *v.* Coleman (20 Texas, 772), who, while advocating a limited time for the creditor,

[1] Huffstater *v.* Hayes, 64 Barb. 573.

[2] Stewart *v.* Cochran, 1 Bailey Eq. 380.

was also obliged to confess that the cases were the other way. "There has been some doubt," said he, "as to the time for the creditor to make the appropriation. In Mills *v.* Fowkes (5 Bing. N. C. 455), cases were cited that the creditor must specify, and in a reasonable time, the debt which he proposes to discharge. This seems a most reasonable doctrine. If the debtor lose the right of appropriation, unless exercised at the moment of payment, the creditor should act upon his right, if not immediately, at least within a reasonable time, and not delay until, perhaps, there be a great change of circumstances, and especially where the law, on his failure, will do exact justice between the parties. But the rule, as at present established by the decisions, is otherwise. It may be doubted whether the plaintiff made any application of the payment until after the commencement of suit, when, on the authorities most favorable for the creditor, it would have been too late."

From such a clashing of the cases, it is apparent that no fixed rule can be deduced. It is entirely clear that the creditor is not required to form his decision at the moment of receiving the payment, but as soon as we go beyond that the ground begins to lose its firmness, and our path is beset with difficulties. A late case in Ohio puts the rule about as reasonably as any we have seen, and we will close this branch of our subject by transcribing it. "It is thought to be the better rule, and the one sustained by the weight of

authority, that the creditor may make the application at any time as between himself and the debtor, but if the rights of third persons are concerned, and affected by the time of application, the creditor should make it in a reasonable time." [1]

IV.

In case of two demands, each exceeding the amount paid, the creditor may apply the payment on whichever demand he pleases—even the largest, and though all of them be barred by the statute of limitations; but he cannot split up the payment and apply it partly on one demand and partly on the other: he must apply wholly on one or the other.[2]

The contrary was held in Jackson *v.* Burke (1 Dillon, 311), the court ruling that a payment might be distributed by the holder of several notes among them all, so as to prevent any of them from being barred by the statute of limitations. It is true that the court held that the debtor gave a direction which might fairly be construed as conferring this authority upon the creditor, but it also said that, aside from that direction, the creditor possessed such a power of application.

In the case of Wheeler *v.* House (*supra*), the Court used the following language: "It is well said, in Ayer

[1] Gaston *v.* Barney, 11 Ohio St. 506.

[2] Ayer *v.* Hawkins, 19 Vt. 26; Wheeler *v.* House, 1 Williams, 735; Blackman *v.* Leonard, 15 La. Ann. 59.

v. Hawkins, 'that the right of designation among the creditor's demands is essentially the right of the debtor,' and 'that if he silently waives it in favor of the creditor, it should be intended that he does so, relying upon an application to which he could not justly or reasonably object;' and it may be added that the debtor has the right to rely upon the application being made in the manner usually adopted in the course of business. Though it may be true that where the debtor at the time of payment neglects to direct its application, the right to make it devolves upon the creditor with certain limitations, and if he has more than one demand against the debtor he may select the one upon which the application is to be made, yet I am not aware of any case, where the payment was not sufficient to cancel one demand, in which the creditor has been allowed to divide up the payment and apply a part to one demand and a part to another, and certainly it is not in accordance with the usual course of business to make such a divided application of a general payment. We think the case of Ayer *v.* Hawkins should govern this, notwithstanding the reasoning of the judge is in some measure grounded upon the fact that the statute had run when the indorsements were made upon the notes. All the right which the defendant yielded to the plaintiff was a selection upon which note he would indorse the payment, and a divided application of the payment is not to be presumed to have been within

the intention of the parties, in the absence of proof. The court will, in the application of payments, carry out the intention of the parties whenever that intention can be ascertained."

But where there is an authority in the transaction conferred on the creditor to make a divided or proportionate appropriation, he will be allowed by the court to do so.

Thus, where four notes made by the same person and indorsed by the defendant were in the hands of the same holder, and the defendant, before any of them became due, gave the holder an order for their payment (without expressing any priority) out of property conveyed by the maker to assignees by an indenture to which the defendant was a party for the payment of the notes in full, or proportionately, which property proved to be insufficient, and the assignees in pursuance of the order made a payment, after all the notes had fallen due, and the holder applied the money to all the notes *pro rata*, instead of applying it wholly to those which had first fallen due: *Held*, that he had a right to make such appropriation.[1] Putnam, J., said: "By the terms of the assignment to which the defendant was a party, the money collected by the assignees was to be applied in payment and discharge of the debts of the party of the first part (the debtor) to the persons named in the schedule (the creditors), in proportion to the de-

[1] Washington Bk. *v.* Prescott, 20 Pick. 339.

mands named in the schedule, without preference or priority, until all the claims should be paid in full."

V.

In some cases, it will be the duty of the creditor to apply the payment ratably on his demands if he have more than one.

Thus, if a payment be made generally to a party who holds a debt due to himself, and another due to himself and a third person, he is bound to apply the payment ratably upon the two notes.[1]

So, also, if a party holds two demands against a party: one in his own right, and the other as agent for another person, and a general payment is made by the debtor.[2]

Ordinarily, in the case of an indefinite payment upon an obligation carrying interest, the creditor has a right to appropriate so much thereof as is necessary to the satisfaction of the interest then due, before any part of the principal is canceled; but if, in the case of such a demand, neither the principal nor the interest has yet become due, the payment shall apply, ratably, so as to extinguish so much of the interest to that time upon so much of the principal as is discharged by the payment.[3]

[1] Colby *v.* Copp, 35 N. H. 434.

[2] Wendt *v.* Ross, 33 Cal. 650.

[3] Stone *v.* Seymour, 15 Wend. 19; Miami Ex. Co. *v.* Bk. of U. S. 5 Ham. 260.

VI.

Where the creditor has a choice of modes of appropriation, he will not be authorized to make such an application as will put the debtor in jeopardy, either as to estate or reputation, as, if one of two debts was contracted while the debtor was a trader within the bankrupt laws, and the other afterwards, the creditor will not be permitted to apply a general payment to the latter, so as to expose the debtor to a commission of bankruptcy.[1]

In another case, it was said that this did not vest the creditor with power to act capriciously or to make such designation as would unreasonably operate to the prejudice of the debtor.[2]

VII.

The principle on which the foregoing exceptions to the creditor's right of appropriation are founded, seems to be this: that the debtor, by waiving his right of application in favor of the creditor, could not have intended that it should be exercised to his own injury, but on the contrary, that he relied on the creditor's making an appropriation to which he could not reasonably object.[3]

[1] Meggot *v.* Mills, 1 Ld. Raym. 286; Dawe *v.* Holdsworth, Peake's N. P. 64.

[2] Taylor *v.* Coleman, 20 Texas, 772.

[3] 2 Greenl. Ev. § 531 *a.*; Early *v.* Flannery, 47 Vt. 253.

VIII.

Certain rules are alike applicable to the two classes.

Thus, we have seen that the application by the debtor need not be express, but may be evidenced by circumstances.[1]

In like manner the application by the creditor is matter of evidence depending upon the circumstances of the particular case.[2]

In Fowke *v.* Bowie, the Court said: "Whether the debtor (owing in his own right, and also *en autre droit*) made any and what application is a question of fact solely cognizable by the jury. There is evidence stated in the exceptions, from which the jury might infer that the defendant applied the payment in his representative character. Whether this testimony was true or not was a question solely for the consideration of the jury, and the court below erred when they instructed the jury that the defendant had not made any application."

We found, also, that the right of application by the debtor existed only in the case of voluntary payments.[3]

The same principle obtains in reference to the creditor's right of appropriation.

[1] *Ante*, page 25.

[2] Allen *v.* Culver, 3 Den. 284; Howland *v.* Rench, 7 Blackf. 236; Fowke *v.* Bowie, 4 Har. & J. 566.

[3] *Ante*, page 31.

Thus, where a creditor recovered one judgment on several notes, some of which were made by the judgment debtor alone and others were signed also by a surety, and took out an execution which was satisfied by a levy: *Held*, that he could not appropriate this money solely to the notes not signed by the surety, but that all the notes were paid proportionately.[1]

[1] Blackstone Bk. *v.* Hill, 10 Pick. 129; Merrimack Co. Bk. *v.* Brown, 12 N. H. 320.

CHAPTER VIII.

AS TO RETRACTION OR CHANGE OF APPROPRIATION.

Where either party has once made a lawful application of a payment, or has acquiesced in any application made by the other party, or where either party has omitted to make such application as he was entitled to make in all such cases, such party is concluded by the affirmative or negative action to which he has committed himself, and cannot in the one case thereafter change any application which has been made, or, in the other case revive the lost right of appropriation.[1]

Whenever a legal appropriation of a payment has been made by either party, upon one of two claims of a creditor against the same debtor, one of the parties alone cannot change the appropriation.[2]

Where a creditor, after having applied a payment made by his debtor to a particular debt, serves on the debtor an account current showing how the payment was applied, which is acquiesced in by the latter for a long time, such application will be conclusive on him, and this even where the moneys were applied by the creditor to satisfy a usurious debt.[3]

[1] This last proposition holds in countries where the civil law prevails. Stone *v.* Seymour, 15 Wend. 19.

[2] Rundlett *v.* Small, 12 Shep. 29; Smith *v.* Wood, Saxon, 74; Harrison *v* Johnston, 27 Ala. 445; Johnson *v.* Johnson, 30 Geo. 857; Wendt *v.* Ross, 33 Cal. 650.

[3] Seymour *v.* Marvin, 11 Barb. 80.

A. owed B. on account, and on a note, and made a payment without any direction as to the application. B. applied it on the note, and afterwards A. settled the balance due on the note, after deducting this payment out of it: *Held*, in an account on the account, that A. could not recall the payment and have it applied on the account.[1]

The same rule governs where the creditor has applied in a way other than the debtor intended, if the debtor has acquiesced in the application made by the creditor.

Thus, where S., the indorser on a protested bill of exchange held by the Branch Bank at Decatur, procured a discount of his note with a view of paying the bill, but having given no directions as to the application of the proceeds, they were placed to his credit on the books of the bank, and afterwards applied by the cashier to the payment of the note, which was thereupon canceled and delivered over to S.: *Held*, that the note must be considered as paid. The Court said: "None of the cases come up to the case at bar, and we apprehend no case can be found where the debtor, after his acquiescence in the application of the fund in the extinguishment of one debt, and holding the canceled demand in his hands, has been permitted to turn round and avail himself of the fund so applied the second time in the extinguishment of an-

[1] Gleason *v.* Hobart, 16 Vt. 472.

other demand, to pay which he may originally have designed it."[1]

The debtor cannot retract his application to an illegal demand even, nor can the court for him, whether the application be a present one made by the debtor himself, or by the creditor under a previous agreement with the debtor that it should be thus made.

"No case can be found," said the Supreme Court of Maine, "where the law by its own vigor has withdrawn a payment deliberately applied to the discharge of a claim, however illegal, and appropriated it in payment of some legal claim existing against the individual making the payment. No such principle as applicable to the appropriation of payments is recognized." And, accordingly, where part of the creditor's claim was for liquors sold by him in violation of statute, which was not collectible, and the debtor had made payments specifically on those items, the court held that they must be so applied, and not to other items which were for groceries.[2]

A similar ruling was made in Massachusetts, in Hubbell *v.* Flint,[3] where Metcalf, J., said: "Having directed the payments made by him to be applied to the claims on him, for liquors unlawfully sold to him by the plaintiff, the defendant cannot now require

[1] Shaw *v.* Bk. of Decatur, 16 Ala. 708.

[2] Treadwell *v.* Moore, 34 Me. 112; Caldwell *v.* Wentworth, 14 N. H. 431.

[3] 15 Gray, 550.

that they be otherwise appropriated. A different doctrine would be tantamount to permitting a recovery back of the money voluntarily paid on an illegal demand, contrary to the established rules of law."

Also in New Jersey, where payments had been appropriated by a debtor on an illegal usurious contract.[1]

And if payments, made by a debtor on account, be applied by the creditor, under a previous agreement, to certain items of the account which are illegal, as for liquor, it has been held in Massachusetts that such payments are valid, and cannot afterwards be revoked by the debtor. "Such an agreement," says Chief Justice Shaw, "would be revocable by the debtor, and he might, on making a payment, give notice that he required it to be applied on other demands, notwithstanding the agreement, and it would be the duty of the creditor to make the application directed, but until such revocation, or such explicit notice from the payer, such agreement would regulate the application of payments to the items for liquor, would make them voluntary payments on that account, and extinguish them *pro tanto*." [2]

Precisely the same ruling has been made in Connecticut.[3] Chief Justice Hinman subjected the question to a very thorough examination. "In the deal-

[1] Feldman *v.* Gamble, 26 N. J. Eq. 494.

[2] Richardson *v.* Woodbury, 12 Cush. 279.

[3] Tomlinson *v.* Kinsella, 31 Conn. 268.

ings of the respondent," he remarked, "with Holcomb & Birdsey, he had at different times received from them, as a purchaser, a considerable quantity of liquors, but the account against him for other articles, which were lawfully sold, was larger than the amount of the notes, and there was an unrescinded agreement between them, made before there were any payments on the account, that the payments which should be made should be applied to the liquor account, and, consequently, not to the other portion of it until the liquors were paid for. Now, it is true, that this was an unlawful agreement, and, therefore, void as a contract, just as the purchase and payment for the liquors on delivery would have been. But it shows, nevertheless, the intention of the parties, at the time the payments were made, to apply them exclusively to the liquor account, and excludes the idea that there was any intention to pay any portion of the lawful account. If, during the running of this account, a cask of liquor had been bought by the respondent and paid for at the time, we presume it would not be claimed that the subsequent lawful account between them, to the amount of the money so paid, would be extinguished by an application which the law would make directly contrary to the intention of all parties, and after the lawful account was settled by a note, surely, no one would claim that such note was void, or that the money paid for the liquor ought to be applied in satisfaction of it. The party receiving money as the

consideration of an illegal sale may, under the statute, be liable to refund it. But to apply it by law as payment to other lawful debts is, in effect, to make a new contract for the parties against their wishes and intentions, and different from that which the law raises from the circumstance that the money may be recovered back under the statute."

And it has been decided, generally, in another case, that where the debtor has distinctly made the application, it is not in the power of the court to vary it against his consent.[1]

A very strong instance of the party paying being bound by his own act, although it was done even in a representative character, is afforded by one of the latest cases in the Court of Appeals of New York.[2] The parties to the action were heirs at law and next of kin of J., deceased, of whose estate the defendant was administrator. The plaintiff drew two drafts on defendant, which the latter paid. Defendant thereafter presented a verified account as administrator to the surrogate, of moneys paid by him to the next of kin, including, in the statement of moneys paid to the plaintiff on account of his distributive share, the two drafts. The surrogate rejected these claims. On appeal to the General Term of the Supreme Court, the surrogate's decision was reversed. In an action brought by the plaintiff for an accounting as to rents

[1] Selfridge *v.* Northampton, 8 Watts & S. 320.

[2] Wright *v.* Wright, 72 N. Y. 149.

and profits of the real estate left by J., which had been received and collected by defendant, the latter set up as a counter-claim the sums paid on the drafts: *Held*, that the facts evinced an intention on the part of defendant to apply the sums paid on the drafts towards plaintiff's distributive share of the personalty, and having thus elected as to the fund out of which said sums should be paid, he was precluded from applying them as against the rents received from the realty. Miller, J., in delivering the opinion of the court, after stating the facts concisely, proceeded: "It appears that subsequent to the payment of the drafts, which was in 1870, and in the month of September, 1875, the defendant, as administrator of his father's estate, presented to the surrogate a verified account of moneys paid and advanced by him to the next of kin of the deceased, with a schedule attached containing a particular statement of moneys paid to the plaintiff on account of his distributive share, in which he charged the amount for which the drafts in question were given, at or about the date of the same. He thus conceded that both of them were applicable on the plaintiff's share of the personal estate of his father. Whatever criticism may be indulged in as to the language employed in the application and the affidavit accompanying the same, it cannot be denied, I think, that these papers evince an intention of the defendant to apply both of the sums named towards the plaintiff's distributive share of such estate. Such being the

irresistible inference from the facts, I think that the defendant is precluded from claiming that such payments were to be differently applied, and that they are a proper and legitimate counter-claim against the rents received by the defendant from the real estate, and it is too late now to interpose such a defense in this action. It is true the surrogate rejected these claims, but his decision was reversed, on appeal, in this respect; and as the case now stands, they were properly presented by the defendant, and should have been allowed. The fact that an appeal was taken and is pending from the decision of the General Term, of itself makes no difference, and cannot change the aspect of the case or aid the defendant, and it is enough that the law, as declared, held them to be legitimate. But in no event is this controlling, for the affidavit of the defendant as to the original application is conclusive against the defendant, and he cannot now withdraw his claim from his account rendered under oath, and use the same as a set-off in this action against the plaintiff's demand. Such a position is inconsistent with the acts and declarations of the defendant heretofore, and cannot be upheld upon any legal ground. He has made his election and is precluded from claiming a right to change his ground."

An exception to this general bent of the authorities, has been noted in a few cases where a debtor, having paid illegal interest, has been allowed, not-

withstanding, to retract it, and have it applied on the legal debt.[1]

E converso, where once the creditor has made his election, he is bound by it.[2]

Thus, where the creditor gave a receipt specifying that the payment was to be applied on a certain account, it was held that this was an appropriation of the payment which the creditor could not afterwards change.[3]

Nor can either of the parties recover a lost right of appropriation through the medium of the court, neither directly by being allowed a second time to make it, nor indirectly by demanding of the court so to make the application as to advance the peculiar interests of that party to the injury of the other party.[4]

Where both the payer and the receiver agree to change an application which has been made, the question has arisen whether such change could be made, and it has been decided that it cannot be done where the rights of other parties intervene.

Thus, where an application of a payment has once been made upon the joint debt, it has been ruled that the application cannot be subsequently changed by

[1] Gill *v.* Rice, 13 Wis. 549; Haven *v.* Hudson, 12 La. Ann. 660.

[2] Allen *v.* Culver, 3 Den. 284; Simson *v.* Ingham, 2 B. & C. 65; Beale *v.* Caddick, 2 Hurl. & N. 326; Smith *v.* Wood, Saxton, 74; Brown *v.* Brabham, 3 Ham. 275; Martin *v.* Draher, 5 Watts, 544; Alexandria *v.* Patten, 4 Cranch, 317; Codman *v.* Armstrong, 15 Shep. 91.

[3] Brown *v.* Brabham, *supra*.

[4] Stamford Bk. *v.* Benedict, 15 Conn. 437.

the concurrent act of the creditor and the paying debtor, and the claim thus be revived without the consent of the co-debtor.[1] The Court said: "The co-debtor, not having consented to any change as to the application of the payment, has the right to insist on its remaining where the parties placed it. It might be a fraud on him to apply it elsewhere."

And such a refusal to change will be made by the court where the rights of third persons are involved[2] —such as sureties[3]—and such change will not be made where the appropriation has been made even by the law, and both debtor and creditor consent to the change, if the rights of a surety will be thereby prejudicially affected.[4]

Where, however, no other rights or interests than those of the parties themselves are at issue, an application, which has been made by either party, may be changed with the consent of both, and in such case the indebtedness which was first discharged will be revived by implication of law, even where there is no express promise.[5]

A fortiori there can be no doubt that in a case where both parties had omitted to make an application, the concurrence of both of them subsequently, in

[1] Thayer *v.* Denton, 4 Mich. 192.

[2] Chancellor *v.* Schott, 23 Penn. St. 68; Terhune *v.* Colton, 1 Beas. Ch. 232.

[3] Logan *v.* Mason, 6 W. & S. 9; Hargroves *v.* Cooke, 15 Geo. 321.

[4] Berghaus *v.* Alter, 9 Watts. 386.

[5] Rundlett *v.* Small, 12 Shep. 29; Smith *v.* Wood, Saxton, 74.

a specified application, would be effectual, for the law makes the application on the failure of the parties to do it, on the presumption of the interest or intention of one or the other of the parties, and, therefore, it would give way to an actual appropriation by both of the parties as furnishing direct evidence, and superseding the necessity of presumption. That would probably be the rule of law even where sureties are concerned.[1]

In the case last cited, an interesting speculative question was started, viz., if the law were that the debtor or creditor must, when each acts by himself and upon his single right, apply the payment when it is made, whether in equity those two parties could subsequently, by concurring in an application, prevent the law from making one, so as thereby to affect the rights of sureties. One limitation, at least, would occur, it was thought, to such a case: the insolvency of the debtor in the meantime, for that event would tie his hands and let the law operate between his sureties and the creditor as things stood at the happening of the insolvency.

The creditor cannot withdraw and change an application which he has once made with the consent of the debtor, even though it was originally against the design and intention of the debtor.[2]

It is an obvious principle, from the foregoing rules,

[1] Moss *v.* Adams, 4 Ired. Eq. 42.

[2] Dorsey *v.* Wayman, 6 Gill. 59.

that when either the debtor or the creditor has made an application in a given case, the other has no right to change it.[1]

Such a change cannot be made, even by the creditor commencing legal proceedings on the claim, after the debtor has made the application, and taking judgment thereon, by default of the debtor, for the full amount of the claim. Notwithstanding such legal proceedings, and this judgment, the payment must still be applied on the debt, just as the debtor originally applied it.[2]

And an executor cannot change an application which has been made of past payments, by others preceding him, so as to revive a lapsed liability of the estate.[3]

Where, however, the payer has been guilty of misrepresentation and misstatements in regard to the accounts or funds at the time of his direction for appropriation, the receiver is not precluded by such appropriation, and may change it upon discovery of the fraud practiced upon him.[4]

And if what was intended as a payment by the debtor, and received as such by the creditor, proves, by subsequent developments, to be incapable of such a construction or treatment, the application which was

[1] Shaw *v.* Bk. of Decatur, 16 Ala. 708.

[2] Sherwood *v.* Haight, 26 Conn. 432.

[3] Merriman *v.* Ward, 1 John. & Hem. 371.

[4] Livermore *v.* Claridge, 33 Me. 428.

made of it will be withdrawn, and the debt revived and reinstated.[1]

All these cases presuppose an actual or completed appropriation, and have no reference to an inchoate but incomplete act of appropriation.

Thus, the entry of payments by a creditor upon one account, does not preclude him from applying them subsequently, within a reasonable time, to any other account to which he might originally have applied them, provided that such entry has not been communicated to the party making the payment.[2]

This is upon the ground that the creditor making private entries in his books, which were not communicated to the other party, did not indicate a complete election so to appropriate the payments, but merely an idea of so appropriating them.

[1] Pritchard *v.* Hitchcock, 6 Man. & Gr. 151; Newington *v.* Levy, 39 L. J. (C. P.) 334.

[2] Allen *v.* Culver, 3 Den. 284.

CHAPTER IX.

THIS RIGHT OF APPROPRIATION CONFINED TO THE PARTIES THEMSELVES.

A VERY useful inquiry in this place is the question, whether any other parties are entitled to a voice in this matter of application?

The general rule may be very broadly and strongly stated, that none others than the party paying or receiving have any power of action or dictation in the premises;[1] but this general rule will be found to be attended with some slight exceptions.

Judge Story, in Gordon *v.* Hobart (2 Sto. 243), said that the right of appropriation of payments was one strictly existing between the original parties, and no third person had any authority to insist upon any appropriation of such money in his own favor, where neither the debtor nor the creditor had made or required any such appropriation; and he ruled accordingly, that the assignee of A. could not insist that money in the hands of B., belonging to A., should be applied in a particular way.

Sureties would seem to have rights in this direc-

[1] 2 Sto. on Con. 5th ed. § 1156; Gordon *v.* Hobart, 2 Story, 264; Wright *v.* Hickling, 2 Law Rep. (C. P.) 199; *In re* Fitzmaurice's Minors, 15 Ir. Ch. 445; Theobald on Prin. and Surety, 165.

tion, if any one had; yet the law is laid down very explicitly in regard to them.

In quite a recent case in Connecticut,[1] it was said: "A surety of the debtor has no voice in the appropriation of payments made by the debtor. The debtor and creditor have the sole right of controlling the payment, and the doctrine that sureties will be favored in the construction and enforcement of contracts has no application to such a case. To do so would be to defeat the object and end of suretyship, and to hold that the surety might have the money which was paid by the debtor so applied as to leave the creditor a loser, notwithstanding his care and vigilance."

The same principle was also enunciated in South Carolina.[2]

The question received great attention in Williams *v.* Rawlinson (10 J. B. Moore, 362), and Lord Chief Justice Best expounded the doctrine quite as explicitly as was done in the foregoing cases. "One fact is extremely strong against the defendant," said he, "viz., that his principal agreed to the application of the payments by the plaintiffs to the old balance, as he saw the accounts every fornight, and received vouchers half-yearly. And he must, consequently, have seen, when the first half-yearly vouchers were sent in, that the sums remitted by him subsequently to the giving

[1] Stamford Bk. *v.* Benedict, 15 Conn. 437.

[2] Sager *v.* Warley, Rice's Eq. 26; Stone *v.* Seymour, 15 Wend. 19; Hansen *v.* Rounsavell, 74 Ill. 238.

of the bond, had been applied by the plaintiffs in liquidation of the old balance. If, therefore, the principal consented to such an appropriation, there is an end of the question, for he clearly had an option as to which account the payments should be applied, and he alone had an unfettered right in this respect, and over which the defendant, as surety, could have no control, unless there were an express or distinct agreement entered into at the time of the execution of the bond, which cannot be collected, or even inferred, from anything that appears on the face of that instrument."[1]

In a case in Ohio, presenting quite a complicated state of facts, and one appealing very strongly to the sympathy of the court in behalf of the surety, the same rule was adhered to.[2] It was said that the interests of a surety cannot be permitted to control the intention of the immediate parties to a payment, and, in the absence of circumstances indicating the debtor's intention in his favor, the law raises no presumption of such intention.

E converso, a principal has no right to control a payment by a surety.[3] But a surety may have a voice in regard to the disturbance of a past application.

Thus, where a payment has once been properly applied upon a particular note, which was made by

[1] See, also, Robson *v.* McKoin, 18 La. Ann. 544.

[2] Gaston *v.* Barney, 11 Ohio St. 506.

[3] Waugh *v.* Wren, 11 Weekly Reporter, 244.

several parties as principals and by another as security, it cannot afterwards be diverted from that application to another debt, upon the mere agreement of one of the principal makers with the holders, so as to revive the original indebtedness against the security.[1]

The rights of sureties in another phase, viz., on "Official Bonds," will be discussed in a subsequent chapter.

In a late case in Pennsylvania, it is said generally that the court cannot go outside of the case, in the absence of an appropriation by the parties, to see whether or not there are other parties interested in the subject of the set-off. They can only deal with the parties before them.[2]

This rule has been encroached upon in a few instances, owing to their peculiar circumstances.

In White *v.* Trumbull (3 Green. 314), it was held that where the case was not one of a running and continuous account, but of several different debts, all of which were due, and on all of which there were sureties and different ones, the payments would be applied *pro rata* on all of the debts.

In Harker *v.* Conrad (12 S. & R. 301), a lumber merchant had separate liens for materials furnished to two houses. After receiving a general payment from the debtor, he suffered his lien on one of the houses to expire. On the trial of his claim filed against the

[1] Miller *v.* Montgomery, 31 Ill. 350.

[2] Hollister *v.* Davis, 54 Penn. St. 508.

other house, it was held that he could not appropriate the payment in discharge of his demand, in respect of which his lien had expired, to the injury of a third person who, without notice, had purchased the property against which the lien was sought to be established.

And while, as a mere question of power in ordinary cases, a surety will be allowed no voice in the direction of the appropriation, yet when he is the victim of a fraud which has been practiced on him, and under the influence of which he has performed acts, he will be heard by the court, and will be relieved.

Thus, where bankers with the knowledge of an act of bankruptcy committed by their customer, took a guarantee from a surety on his behalf, to secure to a given amount all sums then or thereafter to become due from the customer, but the surety had no knowledge of the act of bankruptcy, and afterwards paid to the bankers the full sum for which he was guarantee, without specifying to which portion of the banker's debt the payment was to be applied: *Held*, that such payment was to go in reduction of that portion of the bankrupt's debt which was provable under the fiat, and not of that which was not provable.[1]

Per Vice-Chancellor Knight Bruce, C. J.: "Upon these facts, I think that neither when the guarantees were given, nor when the payments were made, were the guarantors on equal terms with the petitioners;

[1] *In re* Mason, 3 Mont. Deac. & De Gex, 490.

and if those payments were to be held applicable to the portion of the debt that was incurred after the act of bankruptcy of December, and the consequences of that were to render their proofs liable to be expunged, I apprehend that justice would not be done as between the petitioners and the guarantors. * * * Under all the circumstances, I am of opinion that the justice of this case will be best satisfied by applying the £450 received from the guarantors towards the the earlier portion of the debt. * * * I may say that the principle on which Pidcock *v.* Bishop (3 B. & C. 605),[1] proceeded seems not very foreign from the matter before me."

[1] In this case, it was agreed between the vendors and vendee of goods, that the latter should pay 10*s.* per ton beyond the market price, which sum was to be applied in liquidation of an old debt due to one of the vendors. The payment of the goods was guaranteed by a third person, but the bargain between the parties was not communicated to the surety: *Held*, that that was a fraud on the surety, and rendered the guarantee void.

CHAPTER X.

THIRD PRINCIPAL RULE.

If neither party applies the payment, the court will make the application, according to the justice and equity of the case, for the benefit of both parties.[1]

We have now reached the point of greatest divergence between the Roman law and the common law, on this subject.

The pivotal point in the civil law was the intention of the debtor, "*animus solventis.*" To this all other considerations were made to bow. The debtor's real or expressed intention would in all cases prevail, and inasmuch as his actual intention would in the first instance have governed, so, in case of no express appropriation by him, it was his presumable intention that was resorted to as the rule by which the application

[1] Stone *v.* Seymour, 15 Wend. 19; Allen *v.* Culver, 3 Den. 284; Harker *v.* Conrad, 12 S. & R. 301; Hammer *v.* Rochester, 2 J. J. Marsh, 144; Robinson *v.* Allison, 36 Ala. 525; Gordon *v.* Hobart, 2 Story, 243; Robinson *v.* Doolittle, 12 Vt. 246; Matossy *v.* Frost, 9 Texas, 610; Caldwell *v.* Wentworth, 14 N. H. 431; Pierce *v.* Knight, 31 Vt. 701; Miller *v.* Miller, 10 Shep. 22; Cremer *v.* Higginson, 1 Mason, 323; Johnson's Appeal, 37 Penn. St. 268; Bobe *v.* Stickney, 36 Ala. 482; Solomon *v.* Dreschler, 4 Minn. 278; Calvert *v.* Carter, 18 Md. 73; King *v.* Andrews, 30 Ind. 429; Chester *v.* Wheelwright, 15 Conn. 562; Campbell *v.* Vedder, 1 Abb. Ct. of App. Decis. 295.

was to be determined. The inquiry in such case always was, what application would be most beneficial to the debtor. The payment was consequently applied to the most burdensome debt; to one that carried interest, rather than to that which carried none; to one secured by a penalty, rather than to that which rested on a simple stipulation, and if the debts were equal, then to that which had been first contracted. The creditor was, in short, to substitute himself in place of the debtor, and apply the payment to that debt which he would have first discharged if he had been the obligor.[1]

And this is substantially the law of modern continental Europe, and of those countries deriving their jurisprudence from the civil law.[2]

The doctrine here stated has never obtained in the common law tribunals. The right of appropriation has, as we have seen, been accorded to the debtor, in the first instance, to the fullest extent, but upon his failure to avail himself of it very different consequences result.

Upon this matter of difference between the two systems there is a remarkable absence of all discussion

[1] Horne *v.* Planters' Bk. 32 Geo. 1.

[2] Poth. Obl. part 3, c. 1, art. 7, § 530; 1 White's New Recopil, b. 2, tit. 11, pp. 164, 165; Van Der Linden's Laws of Holland, b. 1, c. 18, § 1 (Henry's ed. p. 207); Grotius Introd. to Dutch Jurisp. b. 3, c. 39, § 15, p. 458 (Herbert's Tr.); Civil Code of France, art. 1253–1256; Civil Code of Louisiana, art. 2159–2161; Spiller *v.* Creditors, 16 La. Ann. 292; Farstall *v.* Blanchard, 12 La. Ann. 1; N. O. Ins. Co. *v.* Tio, 15 La. Ann. 174.

in the English cases, especially the older ones. The new doctrine is stated by the courts, and laid down, and acted upon, but no attempt is made to give its history or origin; no comparison instituted between it and other rules; no argument advanced in support of its excellence or superiority. The student may travel through all the old cases where the foundations of the common law rule were being laid, and not glean therefrom the first intimation that there ever existed such a thing as the Roman law.

Even as late as Clayton's Case, judges expressed themselves with hesitation, and Sir William Grant, in his very celebrated opinion in that case, modestly said that those rules were "probably borrowed from the civil law." This is very different from the language of judges fifty years later.

The courts of Scotland, on the other hand, have pursued a very different course, not hesitating to admit their obligations to the civil law, nor to acknowledge their departure from it. In the case of Forbes *v.* Innes (1 Kilkerron's Decisions, 284), cited by the Right Hon. Dr. Lushington, in Campbell *v.* Dent (2 Moore's P. C. C. 292), the Court said: "We have receded much from the civil law in the matter of indefinite payments. With us it has been understood to be applied to the debt worst secured, and to the debt bearing annual rent, to which, as the *durior sors*, it was applied by the civil law; nay, we have now gone so far as instead of the rule of the civil law

that *electio* was *debitoris* we have gone into the direct contrary that *electio* is *creditoris*."

To what this persistent taciturnity in the old English books is owing has exercised the curiosity of students and scholars. The writer in the American Law Magazine, to whom we have already alluded (*supra*, page 1), attributes it to a repugnance to the civil law in England, for which he quotes Sir William Jones as stating that law to be in bad odor among Englishmen, and also Lord Holt as saying, in an important case, that he was loath to quote it.

There is, undoubtedly, some foundation for this charge at the time to which it applies, for, at about the same date, another eminent judge felt obliged to close one of the ablest opinions, ever delivered by any jurist, in the following terms:[1] "I am not wise enough to determine which of the two laws is most perfect—the Roman law or the English, but this I know (which is enough for a judge), that although almost every country in Europe hath received that body of laws, yet they have been with a most stubborn constancy at all times disclaimed and rejected by England. For which reason (and not through any disrespect to the argument I have been endeavoring to answer), I choose to lay aside all that learning *as not being relevant in Westminster Hall*."[2]

[1] Opinion of Chief Justice Pratt (afterwards Lord Camden), in Doe *d.* Hindson *v.* Kersey, 1 Day, 41, note j.

[2] It would seem that an enthusiastic preference for the common law

Happily such a feeling, however strong it may have existed at one time, has long since disappeared. At the very time that Lord Holt made the above quoted disparaging remark, a contemporary judge, the great Lord Chancellor Somers, was mastering, more completely than any of his predecessors had ever done, the principles of the civil law, and incorporating them into the equity system of England,[1] and within the last forty years Lord Cottenham has made the admission, as frank and unqualified as could possibly

was not confined to England, nor to olden times, but had existed "on this side of the water," and at a comparatively recent date. Bronson, Atty.-Gen., and afterwards a distinguished member of the Supreme Court and Court of Appeals of the State of New York, *arguendo* in Seymour *v.* Van Slyck (8 Wend. 403–12), paid the following glowing tribute to that system: "It is the fashion of the day to magnify the civil law to the prejudice of the common law, without regard to the value of the latter. The common law is founded on no particular code of any nation, but is the collected wisdom of what is valuable in the institutions of all nations, as it regards the rights of persons and property. All have been made to contribute to the fund which we claim as our richest inheritance."

[1] The change which has come over the spirit of the equity jurisprudence of England, commencing with Lord Somers' time, and which was owing to the infusion of the principles of the Roman civil law into it, has been well portrayed by the pen of the distinguished biographer of the Lord Chancellors, Lord Campbell, himself a consummate Chief Justice of a common law court, and afterwards an able Lord Chancellor. His tribute to the civil law acquirements of Lord Somers and Lord Hardwicke, and to the value of the contributions to the equity system of England, from these sources, is equally generous and just.

His mention of Lord Somers will be found in vol. 4, of the "Lives of the Lord Chancellors," at page 113, and that of Lord Hardwicke in vol. 5, at page 65.

be asked, that the English law on this very subject had been taken from the Roman codes. "Clayton's Case," said his lordship, "did not establish any new rule of law. The general rules for the appropriation of payments are of much older date than that of Lord Hardwicke's order (in 1743), *and are derived from the civil law.*" [1]

In the American courts, on the other hand, a very lively discussion of the respective merits of the civil law and the common law, in this respect, has ensued from the very outset.

The earliest cases arose in Maryland, where the civil law doctrine was adopted and applied, though without any extended examination into the matter by the court.[2] Chase, Ch. J., treated the doctrine as settled, and did not take the pains to go into the citation of authorities. And the ruling of this early case was re-affirmed at a comparatively recent date.[3]

In Pattison *v.* Hull (9 Cow. 947), Judge Cowen collected the decisions very laboriously, and, while he disclosed his individual opinion very slightly, if at all, yet he regarded the weight of authority as preponderating very decidedly, in the English and American courts, in favor of the civil law doctrine.

The Supreme Court of North Carolina, in 1845, felt constrained to yield, by the force of authority, to

[1] Bower *v.* Marris, Cr. & Phil. 351.

[2] Gwinn *v.* Whitaker, 1 Har. & J. 754.

[3] Calvert *v.* Carter, 18 Md. 73.

the common law rule;[1] but Ruffin, Ch. J., evidently sympathized with the civil law. "Perhaps," said he, "it had been well to have adhered to the original rule of the civil law as more simple in itself, easier understood, and, in its uniform operation, doing as much justice, upon the whole, as any other, however modified. But with no previous predilection for them, we find the exceptions to it so firmly established in the tribunals of the common law, that we have no choice but to adopt them also; and possibly they were necessary to the advancement of credit in our more commercial ages, by affording to the creditor more facilities for securing himself upon the failure of his debtors."

The Supreme Court of Vermont was similarly conditioned in the case of Robinson *v.* Doolittle (12 Vt. 246). Redfield, J., found the authorities leaning towards the common law doctrine, but expressed himself as considering the rule, as it had been expounded in the Maryland courts, "more in accordance with the principles of natural justice and equity, and more correspondent with other established rules upon the same subject."

Judge Story has contributed the influence of his great name to this side of the question. In Gass *v.* Stinson (3 Sumn. 98), he made several earnest pleas in its behalf. At page 110 he says: "There is no doubt that the doctrine of the common law as to the

[1] Moss *v.* Adams, 4 Ired. Eq. 42.

appropriation of indefinite payments has generally been borrowed from the Roman law, and it is deeply to be regretted that there has been any departure from its true results. The Roman law is equally simple, convenient and reasonable upon this subject, and, for most cases, will furnish an easy and satisfactory conclusion."

Again, at page 111, he continues: "Now, the whole of this doctrine of the Roman law turns upon the intention of the debtor, either express, implied or presumed: express, when he has directed the application of the payment, as, in all cases, he had a right to do; implied, when he knowingly has allowed the creditor to make a particular application at the time of payment without objection; presumed, when, in the absence of any such special appropriation, it is most for his benefit to appropriate it to a particular debt. And, notwithstanding there are contradictory and conflicting authorities on this subject, in the English and American courts, I cannot but think that the doctrine of the Roman law is, or at least ought to be, held, and may well be held to be the true doctrine to govern in our courts. There is a great weight of common law authority in its favor, and, in the conflict of judicial opinion, that rule may fairly be adopted which is most rational, convenient and consonant to the presumed intention of the debtor. If the creditor has a right, in any case, to elect to what debt to appropriate an indefinite payment, it seems to me that

can be only when it is utterly indifferent to the debtor as to which it is to be applied; and then, perhaps, his consent that the creditor may apply it may fairly be presumed. Mr. Justice Cowen, in his learned and elaborate opinion in Pattison *v.* Hull, has examined and criticised all the leading authorities, and manifestly leans in favor of adopting the doctrines of the Roman law throughout. I confess myself strongly inclined to the same way, and shall yield only to authorities which I am bound to follow."

The same doctrine is asserted in a recent case in the District Court of the U. S. for Massachusetts.[1] Judge Sprague reasons as follows: "All the authorities agree in one point, that the debtor, when he pays, has a right to say to what debt the payment shall be appropriated, and this for the obvious reason that the debtor might withhold the payment; and if the creditor receives it, he must take it on the terms offered by the debtor. Now, it is said that the debtor failing to exercise the right, it passes to the creditor. Why so? What equity is there in giving this right to the creditor at any subsequent period? If the creditor appropriates it at the moment and with the knowledge of the debtor, and he is silent, there is a presumed assent to the application, otherwise the law ought to appropriate. But on what principles? The Roman law adopted the rule of appropriation sanctioned in the case of Gass *v.* Stinson, and the other

[1] The Ship Antartic, 1 Sprague, 206.

cases cited, viz., that the application was to be made as the defendant would have made it, if he had expressed his choice at the time. Thus, where there are two debts, one secured by a penalty and the other not, or one bearing interest and the other not, the payment in both cases is to be applied to discharge the former, according to the presumed intention of the debtor. I am satisfied that the law applies the same principle in case of a debt secured by a lien, that the debtor would naturally intend to relieve his property from incumbrance. He had the original right of appropriation, but it not having been made by either party, the law comes in and makes it as it presumes the debtor would have done."

In Tennessee, at an early day, preference was given to the civil law rule. In the case of Bussey *v.* Gant (10 Humph. 238), McKinney, J., used the following language: "The doctrine upon this subject, both of the English and American courts, seems to have been borrowed from the civil law. The rule of that law was, that where the application was not made by the parties, and where it became necessary to direct it by a court of justice, it ought to be applied to the debts which lie heaviest on the debtor, and which it concerns him most to discharge. And the weight of authority, in England as well as in this country, is, we think, in accordance with this principle." The learned judge then cites several authorities, such as Pattison *v.* Hull and the cases from Maryland, and gives instances

of the application of the doctrine similar to those already given, and concludes by remarking: "Such, also, is the rule in various other instances in the books." And this may be considered the law in Tennessee.

The civil law rule became acclimated in Mississippi from the first. It was originally asserted in Poindexter *v.* La Roche (7 S. & M. 699), and has been repeatedly recognized and affirmed in subsequent cases.[1] In McLaughlin *v.* Green, Chief Justice Peyton said: "The difference between the common law and Roman law is to be found in the application which the law makes of a payment, in the absence of any made by either the debtor or the creditor. The common law appropriates the payment most beneficially for the creditor; the civil law appropriates the payment most beneficially for the debtor. Whatever difference of opinion may exist with respect to the equity and justice of the rules respectively adopted by these systems of jurisprudence, it must be conceded that the doctrine of the civil law, upon this subject, has been adopted in this State."

These arguments and authorities, however, have not prevailed against the reasoning and the names which appear upon the other side of the question.

Chief Justice Marshall struck the key note of a contrary doctrine, in a very early case,[2] and this is his

[1] Harner *v.* Kirkwood, 25 Miss. 95; McLaughlin *v.* Green, 48 Id. 175; Neal *v.* Allison, 50 Id. 175.

[2] Field *v.* Holland, 6 Cranch, 8.

language: "There is then no question on the merits but this: Were the payments properly applied by the court, or were they applicable to the judgment? The principle that a debtor may control at will the application of his payments is not controverted. Neither is it denied that on his omitting to make this application the power devolves on the creditor. If this power be exercised by neither, it becomes the duty of the court, and in its performance a sound discretion is to be exercised. It is contended by the plaintiffs that, if the payments have been applied by neither the creditor nor the debtor, they ought to be applied in the manner most advantageous to the debtor, because it must be presumed that such was his intention. The correctness of this conclusion cannot be conceded. When a debtor fails to avail himself of the power which he possesses, in consequence of which the power devolves on the creditor, it does not appear unreasonable to suppose that he is content with the manner in which the creditor will exercise it. If neither party avails himself of his power, in consequence of which it devolves on the court, it would seem reasonable that an equitable application should be made. It being equitable that the whole debt should be paid, it cannot be inequitable to extinguish first those debts for which the security is the most precarious. That course has been pursued in the present case."

Referring to this decision, the Court of Appeals of

Virginia, by Allen, J., in a case before it,[1] said: "If neither party makes the application, the law will adjust it by its own notions of equity and justice of the case. The point has never been decided, so far as I can discover, in Virginia. In the absence of any express authority, I incline to the opinion that the position taken by the Supreme Court is, upon the whole, the best. No general rule, applicable to every case, could be adopted and adhered to without producing great hardship. Men keep their accounts loosely. Scarcely any case occurs which does not vary in some material circumstances from every other case. Justice to creditor or debtor would frequently require exceptions to any specific rule that might be adopted, and these exceptions would multiply with the ever varying dealings and transactions of individuals, until at length the rule itself, and the particular cases in which it could apply, would become exceptions. If the parties having the power fail to use it, they cannot complain that the law, not conforming itself to the presumed intentions of either, makes the application according to the justice of the particular case, in view of all the circumstances attending it."

In Stone *v.* Seymour (15 Wend. 19), Chancellor Walworth, in the course of his very learned and exhaustive opinion, thus addressed himself to one of the great supporting considerations of the civil law rule: "The Roman law proceeded upon the erroneous prin-

[1] Smith *v.* Lloyd, 11 Leigh, 512.

ciple, that where there was an indefinite payment the creditor was bound to act upon the golden rule of doing as he would be done by if he were himself the debtor, and therefore must apply it in that way which would be most beneficial to the debtor. In adopting this principle, the Roman lawgivers overlooked the fact that when there were conflicting interests the golden rule applied to the debtor as well as the creditor, and that, upon the same principle, it would be the duty of the debtor to allow his creditor to apply the payment in the way that he might consider the most beneficial to himself. In other words, that the debtor, as well as the creditor, should be required to do as he would be done by under like circumstances, the effect of which conflicting duties would be to leave the application to be made according to equity between the parties. And this rule of equity would not require the creditor, where both debts were due and ought to be paid, to apply the payment to that which was secured upon the debtor's property and drawing interest, instead of that which was insecure, and from which he was deriving no income, while he was deprived of the use of his money by the neglect of the debtor to pay both debts. The true principle unquestionably is that stated by Chief Justice Marshall, in Field *v.* Holland," &c.

But by far the most lengthy and most spirited argument against the civil law doctrine, is that delivered by Chief Justice Gibson, of the Supreme Court of

Pennsylvania, in the case of Logan *v.* Mason (6 Serg. & W. 9). We cannot transcribe it entire, owing to its great length, but will give such excerpts from it as will furnish a tolerable idea of it. "Notwithstanding the admitted excellence of the Latin code, the English judges were constrained to alter almost every part of it which they introduced into the body of the common law, in order to fit it to modern use, and the continental states, who profess to have received it entire, followed only to a lesser extent the footsteps of their more commercial neighbors. These alterations were indispensable to make the jurisprudence of the day keep pace with the changes wrought in the affairs of men by the lapse of a thousand years. Yet, encouraged by an article in the Lawyer's Magazine, and by the authority of Mr. Justice Story, in Gass *v.* Stinson, the district court have disregarded an actual application by the creditor in due season, though there had been no application by the debtor. For every thing that comes from Mr. Justice Story I feel a deferential respect, and had not the weight of his name been thrown into the scale, I should not have felt myself called upon to vindicate the rule of the common law. But in saying that, as regards the application of payments, the Roman law is more rational and consonant to the presumed intention of the parties than the common law; that it is equally simple and convenient, and that it is, or ought to be, the law of the subject in this country, it seems to me his partiality for his

favorite code has carried him too far. In the American courts the question is not an open one, and it would require some intolerable mischief, certainly more than an equality in point of simplicity, convenience and reasonableness, to justify us in overturning the decisions of more than two centuries. Were we called on to engraft a new principle on the common law stock, without lopping a branch to make room for it, I would certainly do as Lord Mansfield did in laying the foundations of the English commercial law. I would take it from what he, perhaps justly, called the first collection of written reason that ever existed. Its fault, if it has one, is in aiming to do too much, by attempting to give effect to abstract equities which are too subtile to be dealt with by a human tribunal, at least by one encumbered with a jury. It is agreed that the application of a payment belongs to the debtor in the first instance, and that in default of application by him it devolves on the creditor. So far the Roman law and the common law march together. But the Roman law has this extraordinary proviso, that the creditor make the application as he would make it if he were the debtor, and any other application by him would go for nothing, on the ground that his act is consonant to the presumptive wish of the parties only where it is most beneficial to him who paid. It is scarce necessary to say how unfounded is such a presumption in experience, which is the mother of presumptions. It certainly is a narrow basis for a

moral duty. Why should the creditor, standing in no relation of confidence, be expected to take care of the interests of a party who is too supine or indifferent to take care of it himself? Conscience has nothing to do with such a case, for the man who will not exercise his right at the proper time, renounces it. * * * * * A right of choice is essentially exclusive, and if the creditor's right of application is to be controlled by the interest of the debtor, it is no right at all. The exercise of the power devolves on the creditor, either as a right or as a duty. If as a right, it is absurd to say he may exercise it, but only in subordination to the right of another. Yet the Roman law says so, and tacitly admits that its proviso is repugnant to its rule. If, however, the power devolved on the creditor, subject to a duty to make the application in a particular way, he might be compelled to make it. But why compel him to go through the form of an application which the law would make without his assistance? The well-founded remark of the Chancellor of New York, in Stone *v.* Seymour, shows clearly the want of a moral obligation in this matter, which the Roman law would enforce as a moral duty. As a rule of morals the golden precept to do as we would be done by, ought to bind the debtor as it binds the creditor, yet it is not assumed by that law that the debtor, when he makes the application, is bound to consult the interest of the creditor, though it is a maxim of our law that equality is equity. * * * * The

true cause that there is priority of application at all, is not the supposed merit or misfortune of the party, but necessity. It must be vested somewhere, and the common law vests it in the debtor, because in the transaction of payment he takes the first step. 'If election is given of several things,' says Lord Coke (1 Inst. 144), 'he shall have it who is the first agent, and ought to do the first act.' If, as I conjecture, the Roman law has the same origin, its supposed sentiment is no better founded than its morality."

This doctrine is still firmly held in Pennsylvania, for in a very recent case[1] it is said by Strong, J., that "it is presumed that the debtor by neglecting to give any direction consented to such application as would be most beneficial to the creditor."

From the foregoing, it is conceived that a pretty intelligent and comprehensive idea can be formed of the manner in which this question has progressed towards, and finally reached, a settlement in England and in this country.

It now remains to consider the rule itself.

In the form in which it is stated at the commencement of this chapter, it is rather the enunciation of a principle than a rule for practical application. It is noticeable in how many general and indeterminate expressions the courts have indulged in stating the rule, and if they were to be accepted as the only criterion for our guidance and action it would be as varying

[1] Johnson's Appeal, 37 Penn. St. 268; Smith *v.* Brooke, 49 Id. 147.

and uncertain as the famous "Chancellor's foot" rule of olden times was reputed to be.

The application: "becomes the duty of the court, and in its performance a sound discretion is to be exercised;"[1] "the law will apply the payments according to its notions of justice;"[2] "on equitable principles;"[3] "according to the justice of the particular case in view of all the circumstances attending it;"[4] "according to its own notion of the intrinsic equity and justice of the case;"[5] "according to the justice and equity of the case for the benefit of both parties;"[6] "so as to effectuate justice;"[7] "according to the intrinsic justice and equity of the case;"[8] "the law will make such application as it deems equitable;"[9] "such application as is just and equitable between the parties;"[10] "an equitable application, and in making it will regard the circumstances of the case;"[11] "in de-

[1] Field *v.* Holland, 6 Cranch, 8.

[2] U. S. *v.* Kirkpatrick, 9 Wheat. 720.

[3] Stone *v.* Seymour, 15 Wend. 19; Compbell *v.* Vedder, 1 Abb. Ct. of App. Dec. 295.

[4] Smith *v.* Lloyd, 11 Leigh. 512.

[5] Cremer *v.* Higginson, 1 Mason, 323.

[6] Allen *v.* Culver, 3 Den. 284.

[7] Hammer *v.* Rochester, 2 J. J. Marsh, 144.

[8] Robinson *v.* Allison, 36 Ala. 525; Chester *v.* Wheelwright, 15 Conn. 562; Matossy *v.* Frosh, 9 Tex. 610; Solomon *v.* Dreschler, 4 Minn. 278.

[9] Robinson *v.* Doolittle, 12 Vt. 246.

[10] Pierce *v.* Knight, 31 Vt. 701.

[11] Johnson's Appeal, 37 Penn. St. 268.

fault of actual appropriation the matter is to be determined by rules and circumstances of equity."[1]

It is obvious that no definite mode of action is prescribed by these loose and indefinite expressions. If this were all there was of the system, the question would simply be one resting in the equitable perceptions of the court in each particular case instead of a system of jurisprudence based upon enlightened and well defined principles. Such a condition of the law would be diametrically opposed to Lord Coke's notions of judicial action,[2] and would be obnoxious to all the criticism conveyed by Lord Camden's famous dissection of judicial discretion, contained in his opinion in Doe *d.* Hindson *v.* Kersey, already cited[3] (*supra*, p. 84).

That the rule is not intended to be of such a character is manifest from the language of the courts whenever they have expressed themselves closely on the point.

Thus in Miller *v.* Miller (10 Shep. 22), it is said that "in such a case the court may make the application, but in doing so it must be governed by general

[1] Harker *v.* Conrad, 12 S. & R. 301.

[2] "A judge's discretion is *discernere per legem*;" a judge is to be guided by the straight line of law, and not by the crooked cord of discretion."

[3] "The discretion of a judge is the law of tyrants. It is always unknown. It is different in different men. It is casual and depends upon constitution, temper and passion. In the best it is oftentimes caprice; in the worst, it is every vice, folly and passion to which human nature is liable."

and, as far as may be practicable, by established rules. The court cannot be at liberty to adopt its own notion of what may be equitable in each particular case."

In a few of the cases, the expressions are more accurate and specific.

Thus in Bobe *v.* Stickney (36 Ala. 482), it is said the law makes the application *on certain rules of its own*, and in other cases it is stated that the court will make the application by appropriating the payment to the oldest debt, or in some other certain manner specifying it.

This approaches more nearly the requisite propriety of statement. The truth is that the general rule, which we have given, and the foregoing expressions are simply declaratory of a principle of action. The mode of application branches out into a variety of minor rules each based upon some specific equity or good reason, and each susceptible of definite application, which we will take up in their order.

FIRST MINOR RULE.

In the case of payments where no appropriation is made by either party, and there is but one continuous account of several items, the payments will be applied on the account according to the priority of time, that is, the first item on the debit side is discharged or reduced by the first item on the credit side.[1]

This important rule was settled by the Master of the Rolls in 1816, in Clayton's Case, which is a very celebrated case, *and has been referred to, perhaps, as frequently as any other case upon any subject in the books*, and never cited except in terms of approbation or of eulogy. It was a case of a banker's running continuous account, and the question was how

[1] Devaynes *v.* Noble (Clayton's Case), 1 Mer. 584–610; Bodenham *v.* Purchas, 2 B. & Ald. 39; Williams *v.* Rawlinson, 10 J. B. Moore, 362; Brooke *v.* Enderby, 2 Brod. & Bing. 70; Simson *v.* Cooke, 1 Bing. 452; Webb *v.* Dickinson, 11 Wend. 62; Wheeler *v.* Cropsey, 5 How. (N. Y.) 288; Fairchild *v.* Holly, 10 Conn. 175; Berghaus *v.* Alter, 9 Watts, 386; Hargroves *v.* Cooke, 15 Geo. 321; Livermore *v.* Rand, 6 Fost. 85; Shedd *v.* Wilson, 27 Vt. 478; Allcott *v.* Strong, 9 Cush. 323; Harrison *v.* Johnston, 27 Ala. 445; Pierce *v.* Sweet, 33 Penn. St. 151; Dawe *v.* Holdsworth, Peake's N. P. 64; Allston *v.* Contee, 4 Har. & J. 351; Field *v.* Carr, 5 Bing. 13; Johnson's Appeal, 37 Penn. St. 268; Cushing *v.* Wyman, 44 Me. 121; Crompton *v.* Pratt, 105 Mass. 255; Hill v. Robbins, 22 Mich. 475; Worthley *v.* Emerson, 116 Mass. 374; Dows *v.* Morewood, 10 Barb. 183; Pennell *v.* Deffell, 4 De G. Mc. & G. 372; Copland *v.* Toulmin, 1 West. H. of Lords Cas. 164; Grigg *v.* Cocks, 4 Sim. 438; *Re* Browne, 2 Grant. Ch. (Can.) 590; Johnson *v.* Anderson, 30 Ark. 745; Leef *v.* Goodwin, Taney, 460; Sprague *v.* Hazenwinke, 53 Ill. 419; Killorin *v.* Bacon, 57 Geo. 497; U. S. *v.* Kirkpatrick, 9 Wheat. 720; Jones *v.* U. S. 7 How. 681; U. S. *v.* Bradbury, Davies, 146; Langdon *v.* Bowen, 46 Vt. 512.

payments which had been made generally should be applied upon it. Sir William Grant disposed of the question in the following manner: "This is the case of a banking account where all the sums paid in form one blended fund, the parts of which have no longer any distinct existence, and is not a case of distinct, insulated debts. Neither banker nor customer ever thinks of saying, this draft is to be placed to the account of the £500 paid in on Monday, and this other to the account of the £500 paid in on Tuesday. There is a fund of £1,000 to draw upon, and that is enough. In such a case there is no room for any other appropriation than that which arises from the order in which the receipts and payments take place, and are carried into the account. Presumably, it is the sum first paid in that is first drawn out. It is the first item on the debit side of the account that is discharged or reduced by the first item on the credit side. The appropriation is made by the very act of setting the two items against each other. Upon that principle all accounts current are settled, and particularly cash accounts. When there has been a continuation of dealings, in what way can it be ascertained whether the specific balance due on a given day has or has not been discharged, but by examining whether payments to the amount of that balance appear by the account to have been made? You are not to take the account backwards, and strike the balance at the head instead of the foot of it. A man's banker breaks, owing him on the whole account a

balance of £1,000. It would surprise one to hear the customer say: I have been fortunate enough to draw out all that I paid in during the last four years, but there is £1,000 which I paid five years ago that I hold myself never to have drawn out; and, therefore, if I can find anybody who was answerable for the debts of the banking house, such as they stood five years ago, I have a right to say that it is that specific sum which is still due to me, and not the £1,000 I paid in last week."

The next case was Bodenham *v.* Purchas (*supra*) in a court of law. The facts were these: A bond was given to the several persons constituting the firm of a banking house conditioned for the repayment of the balance of an account, and of such further sums as the bankers might advance to the obligor. One of the partners died, and a new partner was taken into the firm, and at that time a considerable balance was due from the obligor to the firm. Advances were afterwards made by the bankers and payments made to them on account of the obligor. The latter was credited by the new firm with the several payments and charged with the original debt and subsequent advances as constituting items in one entire account. The balance due at the time of the partner's death was considerably reduced, and that reduced balance, by order of the obligor, was transferred by the bankers to the account of another customer who, with his assent, was charged with the then debt of the obligor. The person so charged having become insolvent, the

surviving partners of the original firm brought their action upon the bond: *Held*, that as they had not originally treated it as a distinct account, but had blended it in the general account with other transactions, they were not at liberty so to treat it at a subsequent period; and that, having received in different payments a sum more than sufficient to discharge the debt due on the bond at the time of the death of the deceased partner, the bond was to be considered as paid. Bayley, J., said that he could not distinguish this in principle from Clayton's Case. Abbott, J., also thought that the question was decided by that case, and Holroyd, J., declared that Clayton's Case, which seemed to him to have been decided upon the soundest principles, was "exactly in point, and ought to govern their decision."

In Bodenham *v.* Purchas, Clayton's Case was spoken of by Abbott, J., as "a case decided upon great consideration," and as being "an authority of great weight."

In Field *v.* Carr (*supra*), Best, Ch. J., and Park, J., both said that "the rule settled by Sir William Grant had received the sanction of every court in Westminster Hall."

In Pemberton *v.* Oakes (4 Russ. 154), Lord Chancellor Lyndhurst assigned it its place among the English juridical authorities in the following encomiastic terms: "The third question is whether the balance due from Stokes to the bank at the time of Harding's death has been discharged by his subsequent pay-

ments, and that point is decided by Clayton's Case and Bodenham *v.* Purchas. It is true that the facts here are not, in every respect, precisely the same with the circumstances of those two cases, but the decisions in them proceeded upon a broad general principle equally applicable to the state of circumstances existing here. * * * In Bodenham *v.* Purchas, a court of law confirmed the rule which Sir William Grant had laid down in a court of equity. The point was again brought into discussion in Simson *v.* Ingham, and the principle was again confirmed, though the particular circumstances of the transaction produced a different decision. * * * The same question arose in Brooke *v.* Enderby before the Common Pleas, and there, too, the principle of Clayton's Case was adopted. Feeling myself bound by the force and authority of these decisions, and acquiescing completely in the reasoning of Sir William Grant, I decide," &c.

Still later, in 1859, Sir John Romilly, Master of the Rolls, spoke of the rule in Clayton's Case as "having always been acted on since."[1]

The principle enunciated by this case has been very extensively applied, both directly and by way of analogy.

Where frequent settlements of accounts with debt and credit are made between the parties, and balances carried forward to new account, and no appropriations have been expressly made by the parties, the law will

[1] *In re* Medewe's Trust, 26 Beav. 588.

appropriate the credits to the extinguishment of the oldest charges.[1]

This rule is applicable where such payments are made by one of full age upon an account commencing before and terminating after the debtor's majority.[2]

It will be applied without reference to the fact that one item may be better secured than another when the particular parts have been blended together in one common account, and have no longer any separate existence, and the balance only is considered as due.[3]

The Court of Appeals of the State of New York[4] applied this rule in a case where the creditor held security for the first items of the account and none for the final balance of the account, it appearing in the case satisfactorily that the parties had manifested an intention of making such an application. Jewett, J., delivering the opinion of the court, said: "There is, it is true, no direct evidence in the case showing any express application of the moneys paid by Brown & Starkweather upon the judgment at the time of the receipts of the money, but the manner in which Williams & Co. kept the accounts between them from 1835, and ascertaining the balance due from them from time to time, show that the indebtedness for which the bond was given on which the judgment was entered was brought into the account and

[1] McKenzie *v.* Nevius, 9 Shep. 138.

[2] Thurlow *v.* Gilmore, 40 Me. 378.

[3] Harrison *v.* Johnston, 27 Ala. 445.

[4] Truscott *v.* King, 6 N. Y. 147.

made a part of it from the beginning, and that both parties intended to apply, and did, in fact, apply, the first receipts of money to the first items of indebtedness. Williams & Co. kept an account from the beginning, in which they charged Brown & Starkweather with their acceptances, and credited them with money when received, and from that account the balance due from time to time was found."

This rule was appealed to, and considered apposite by the court in a case where A., the widow and administratrix of B., continued B.'s trade after his decease. B., at his death, was indebted to C. on balance of account. A. continued to receive goods from and make payments to C., as B. had done, and she was charged in account by C. with the debt. The payments made by her to C. exceeded the debt, but a balance was ultimately due to C.: *Held*, that B.'s debt was discharged by A.'s payments, and that the ultimate balance could not be proved as a debt against B.'s estate.[1]

A case arose recently in the State of Massachusetts, presenting a very peculiar state of facts for the question of the applicability of this principle. A., who was a dealer in machinery, sold B., at different times, several machines, at agreed prices, all of them to remain the property of the vendor until paid for. He opened an account with the vendee in his books in the ordinary manner, debiting him with the machines at the various dates when sold, and entered a memorandum of the conditions of sale. He after-

[1] Sterndale *v.* Hankinson, 1 Sim. 393.

wards sold B. other goods, and entered them in the same account in their order. B. made payments at different times, which were entered in the usual manner on the opposite side of the account as credits: *Held*, that the payments were to be applied to the earliest items on the debit side of the account in their order.[1] Wells, J., said: "Upon the facts stated, we think a jury would be warranted in finding that the price of the articles sued for had been paid by O'Brien to the defendant before the latter retook and sold them. They were charged in general account upon the defendant's books with other articles sold and delivered in the usual mode. They were the earliest in date upon that account, the whole account being kept in the usual form of merchants' book accounts. The sums credited were paid by O'Brien, and were received and applied by the defendant towards the payment of said account. Neither of them directed or made any specific application thereof to any particular items, or class of items, of the account, except as appears from the facts stated. The general rule of law in case of payments by a debtor to one who is his creditor upon distinct transactions, or for distinct accounts, when neither party makes an appropriation at the time, is that the payments are applied by law to the liabilities of earliest date. The authorities cited by the plaintiffs, we think, sufficiently sustain this position. The rule is especially applicable to items of debt and credit in a general account cur-

[1] Crompton *v.* Pratt, 105 Mass. 255.

rent. We do not think the other facts stated are sufficient to overcome the presumption involved in this rule of law. The interest of O'Brien to perfect his title to the property weighs against the interest of the defendant to obtain payment of his unsecured rather than of his secured claims. But the option belongs to the debtor rather than to the creditor, and it is only when he omits to exercise that option that the law presumes an intention on his part to allow the creditor to exercise his election. When both parties concur in the entry of the payments upon general account, without specific application, the law infers an intention on the part of both that they shall satisfy the charges therein in the order of their entry, and they will be so applied unless some controlling equity requires a different disposition. We do not discover any such controlling equity in this case. The fact that the defendant minuted the terms of the delivery against the charges upon his books when the entries were made, does not, in our opinion, affect the question of the intent with which the payments were made, received and credited."

An additional reason for resorting to this rule was found in a case where payments had been made from time to time without application by the debtor, who had received a discharge in bankruptcy, upon a running account for goods sold at different dates, partly before and partly after the granting of the discharge, the creditor having no notice of the bankruptcy proceedings, and not being named in the bankrupt's

schedules as a creditor, and where the payments made after the discharge was granted exceeded in amount the goods purchased after that time.[1] The Court said: "Assuming the discharge in bankruptcy to be valid, it did not relieve Hill from the moral obligation to pay his pre-existing debts. This moral obligation he was at liberty to recognize and discharge, if he saw fit to do so, and in this record we discover very satisfactory evidence that such was his intention at the time. Although not having named Robbins in his schedule of creditors, he continued an open account with him pending the proceedings, not only buying, but making payments, without any direction that they should be applied to the new purchases. His omission to notify Robbins of his petition in bankruptcy, can only be reconciled with honesty on the supposition either that he was exceedingly thoughtless concerning his current business dealings and the rights of others in respect thereto, or that he fully intended to discharge the demand by payment. The subsequent payment by him, of a sum in excess of his purchases after the bankruptcy proceedings commenced, is strong evidence of his understanding that the payments he made would be applied on the account generally, instead of being limited to the portion thereof not covered by the discharge. And as Robbins, having no knowledge of the bankruptcy proceedings, would naturally so apply them, there is no principle of law which will permit Hill, on a subsequent change of pur-

[1] Hill *v.* Robbins, 22 Mich. 475.

pose, to make a different appropriation of the payment. He has no right to make Robbins his debtor against his will, by payments which the latter understands, and has a right to understand, are only his just due."

A very recent case in England shows the influence of Clayton's Case to be still undiminished in the courts. The defendants, as factors for R. & Co., in February, 1857, purchased certain silk for that firm, and paid the purchase money. In the same month R. & Co. sold it to the plaintiff, but it remained in the defendants' warehouse until July, 1858, when they sold it to liquidate, in part, a debt due from R. & Co. to them upon the balance of a general account current which was kept between the firms. At the time of the purchase of the silks, however, the balance was in favor of R. & Co., and so remained at the half-yearly settlement of accounts between R. & Co. and the defendants, six months later: *Held*, that this settlement of accounts amounted to a re-payment to the defendants by R. & Co. of the purchase money paid for the silk.[1] Lord Cockburn, Ch. J., expressed himself thus: "The cases of Bodenham *v.* Purchas and *ex parte* Clayton, show that where a general account exists and items are entered on both sides of it, then, even although the account may relate to different transactions which might have been made the subjects of separate accounts, the appropriation of payments is to be made according to the priority of the various items. This doctrine seems to me to be a sound one.

[1] Siebel *v.* Springfield, 12 Weekly Reporter, 73.

There were numerous pecuniary transactions here, but only one general account. That being so, we must treat it on the above principle, and, therefore, if a balance in favor of Rudolf, Jung & Co. was struck subsequent to the purchase by the defendants of these goods and to the advances made in respect of them, we must take it that the price of the goods had been repaid to the defendants."

In Pennell *v.* Deffell,[1] a customer of a bank had deposited therein his own private funds, and also moneys in his hands as a trustee, and had kept the whole blended in a single account, and the contention was whether his drafts on the bank, from time to time, should be applied on the account in the chronological order of the items, or whether they should be distributed thereon so as to cancel the indebtedness of the bank to him by virtue of his individual moneys, and have it owing him in regard to the trust moneys, and it was held that the rule in Clayton's was the proper one for the case. Lord Justice Knight Bruce said: "This state of things would not, I apprehend, be varied by the circumstance of the bank holding also, or owing also to him, money in every sense his own. It may be, however, and, as I think is, true, that checks drawn by the trustee in a general manner upon the bank would for every purpose be ascribed to, and affect, the account in the mode explained and laid down by Sir W. Grant in Clayton's Case. The prin-

[1] 4 De G. M. & G. 372.

ciples there stated would, I conceive, be applicable notwithstanding the different nature and character of the sums forming together the balance due from the bank to the trustee, whatever the purpose and objects of the checks." Lord Justice Turner, in his opinion, employed similar language: "I take it to be now well settled that moneys drawn out on a banking account are to be applied to the earliest items of the opposite side of the account. By every payment which he makes, the banker discharges so much of the debt which he first contracted. If that debt arose from trust moneys paid in by the customer, so much of those trust moneys is paid off, and, unless otherwise invested on account of the trust, falls into the customer's general estate, and is lost to the trust, because it cannot be distinguished from the general estate of which it has become part. If, upon the other hand, the earliest debt due from the banker arose from the customer's own moneys, paid in by him, that debt is *pro tanto* discharged, and the trust moneys subsequently paid in remain unaffected. The same principle runs through the whole account, each sum drawn out goes to discharge the earliest debt due from the banker which is remaining unpaid, and thus, when it is ascertained what moneys have been paid in belonging to the trust, it becomes clear to what portion of the balance which remains the trust estate is entitled."

This case is spoken of by Vice Chancellor Sir W.

Page Wood, in Merriman *v.* Ward,[1] as a very strong example of the rule in Clayton's Case.

The facts in Brown *v.* Adams[2] were very like those in Pennell *v.* Deffell, and the following remarks fell from Lord Justice Sir G. M. Gifford: "There can be no question that at law, as between a banker and his customer, the debt is extinguished by the first payments made, and it would be an extraordinary thing if the debt would be in existence in equity when it is extinguished at law."

The principle of Clayton's Case has been carried beyond cases of accounts strictly, and has been employed in other cases by way of analogy.

It was said by the Supreme Court of Virginia,[3] that in general where several debts are due and payments are made without specific application by either creditor or debtor at the time, the payments ought to be applied to extinguish the debts according to priority of time, and the doctrine has been re-affirmed in late cases in that State.[4]

A similar remark was made by the court in the case of Hammer *v.* Rochester (2 J. J. Marsh. 144).

Where no application is made by either party, the law will make the application to the oldest legal claim then due, if there is no particular equity or reason for a different course.[5]

[1] 1 Johns. & H. 371. [2] 4 Law Rep. (Chan. App. Cas.) 764.

[3] Smith *v.* Lloyd, 11 Leigh, 512.

[4] Howard *v.* McCall, 21 Gratt. 205; Chapman *v.* Com. 25 Gratt. 721.

[5] Parker *v.* Ingram, 2 Fost. 283; Thompson *v.* Phelan, Id. 339; Milliken *v.* Tufts, 31 Me. 497; Bean *v.* Brown, 54 N. H. 395.

Nor is this course arbitrary and inequitable, but rests on a like foundation with the other rules where the debtor says nothing.

It must be presumed, if there be no other equity to settle the question, to pay first what has been longest due, and about which there has been most forbearance on the one side and neglect on the other, and which is nearest being barred by the statute of limitations.[1]

By the earliest debt is meant the one first due and payable, although it may be the latest in origin, and, therefore, if the earliest debt is not due and payable at the time of payment, the law will apply the payment to the debt which had a later origin but was then due upon the obvious presumption that the one party intended to pay and the other must have understood that he was receiving the money in discharge of something which the creditor had the right to claim at the time.[2]

Payments made generally on a bond payable in installments without appropriation at the time to any particular installments, will be applied to such as are past due and not to such as are not then payable.[3]

In the last case the Court said: "This is just, because it must be presumed to have been so intended by the parties, or, at least, by the debtor and payer at the times the payments were made, because it would be contrary to reason and the motives which generally influence

[1] Whitmore *v.* Murdock, 3 W. & M. 380; Hollister *v.* Davis, 54 Penn. St. 508.

[2] Caldwell *v.* Wentworth, 14 N. H. 431.

[3] Seymour *v.* Sexton, 10 Watts, 255.

human action, to presume that a debtor in paying money intended to apply it to the discharge of a debt not bearing interest, and which had not at that time become payable, in preference to a debt which was bearing interest, and had become payable; nor would a creditor be permitted to claim that it should be so applied without the express consent of the debtor."

Upon the same principle, in the case of three bonds executed by the debtor of same date, but payable at different times, and on a general payment it was held, that it should be applied on them in the order of their falling due, the payment in the case before the court paying the first two bonds in full, and leaving a further sum for application on the last one.[1]

In Mississippi the principle has been carried to the extent of paying an earlier item so completely as to satisfy both principal and interest of such earlier item before touching even the interest on a later item.

Thus, where several promissory notes or bonds had been executed on the same day and by the same maker, and paying to the same persons, but falling due at different times, it was held that partial payments, made by the debtor to the creditor after they had all become due, would be applied to the satisfaction of the principal and interest of the note first falling due, in preference to the interest on the others.[2] The Court said: "The four notes, although originating in the same transaction, must be treated as four several and distinct con

[1] Huger *v.* Bocquet, 1 Bay. 497.

[2] Miller *v.* Leflore, 32 Miss. 634.

tracts, for, otherwise, no suit could be maintained on any one of the notes until they all became due. Besides, they could have been indorsed to different persons who could have maintained several actions thereon, whereas, if all the notes constituted but one contract, one of the notes could not, in a legal sense, be indorsed so as to invest the indorsee with the legal title, as part of a contract cannot at law be indorsed so as to pass the title. The question then being settled that each note was a separate contract the case falls within a familiar rule, that contracts must be performed in the order in which they were made, that is to say, the defendants undertook to pay, and the plaintiffs to receive payment of the first note before payment of the second note, and so on in this order until the last note should be paid. Suppose suit had been commenced on the first note when it became due, the measure of damages would have been the principal and interest accrued when the judgment should have been rendered. The same rule would have applied to the other notes if suits had been commenced when they severally fell due."

The following ruling was made, it is conceived, in analogy with the principle under consideration. Advances made on account generally for work done under several distinct contracts, some of which have not been completed, must be applied in the first place to the extinguishment of the amounts due on the contracts which have been completed, and not of those which have not been completed.[1]

[1] McDowell *v.* Blackstone Canal Co. 5 Mason, 11.

The Supreme Court of Maine adhered to the rule in a very close question between a judgment creditor of the debtor, and a grantee under him. One party claimed under the extent of an execution, and the other under a deed of the same premises from the judgment debtor, and one item in the account which formed part of the foundation of the judgment of the execution creditor, was subsequent to the deed, and a credit of large amount was also subsequent, and neither party had made an appropriation of the payment. The court held that it could not depart from the general rule, even to enable a creditor to contest a conveyance alleged to be fraudulent as to prior creditors, but must apply the payment in extinguishment of the oldest item, instead of the most recent.[1]

This rule has been called into requisition in cases of moneys realized from a fund created by the debtor instead of payments directly made by him.

Thus in a case in Vermont,[2] it was decided that money realized by a surety, on security given him by his principal to protect his liability as surety, ought to go to extinguish his claims for payments for the principal in the order in which they were made, and that the surety could not apply the money so realized toward the payment of demands unconnected with his relation as surety, so long as any claims arising from his suretyship remained unpaid.

In a recent case in the State of Maine, it was held

[1] Miller *v.* Miller, 10 Shep. 22.

[2] Whipple *v.* Briggs, 30 Vt. 111.

that, in the case of a running account, this rule will be applied although the creditor may hold security for the earlier items, and none for the final balance of the account.[1] As a broad, unqualified proposition, this may be questioned; certainly the authority cited in support of it (Truscott *v.* King, 6 N. Y. 147) does not proceed to that extent, for as we have already seen (page 107), there was satisfactory evidence in that case, that the parties designed the payments to be applied in that order.[2]

Exceptions to this Rule.

It has been said that this rule, although general, is by no means universal.

It is not an artificial or arbitrary principle, but one founded merely on the presumed intention of the parties, and is applicable only where there is no evidence sufficient to show a different intention.

But where there is such evidence, the presumption fails.

And such evidence may consist of any facts and circumstances from which the intention of the parties may properly be inferred.

It is obvious that all the transactions between individuals may be, and often are, entered together in the form of one general account, for the purpose of more readily ascertaining the state of all the affairs between

[1] Cushing *v.* Wyman, 44 Me. 121.

[2] The reporter's head note on this point, to Truscott *v.* King, is incorrect and calculated to mislead.

them, or for some other purpose of mere personal convenience, and it would be unreasonable indeed if an inflexible rule of inference should be adopted, which would preclude them from showing, in such a case, what was their real object and intention.[1]

And in another case,[2] it was said that this rule applies to running accounts where such payment must be presumed to have been made without other reference than to the simple discharge of the account as far as the items of payment will go, and does not apply where the party having the right to make an appropriation of a payment does actually make it, or in the absence of such appropriation, when the law, looking at the relations of the parties, and the nature of the account or transactions between them, finds another application required in order to do justice between them.

In Wilson *v.* Hirst (1 Nev. & Man. 742), Denman, Ch. J., said such a state of facts as those in Clayton's Case, was evidence of such a payment, but not conclusive, and other evidence might be adduced to vary the application of the rule.

The facts may evince a different intention on the part of the debtor.

Thus, where security had been given by a surety for goods to be supplied to his principal, and not in respect of a previously existing debt, and goods were subsequently supplied and payments were made from time to time by the principal, in respect of some of

[1] Dulles *v.* De Forest, 19 Conn. 190.

[2] Upham *v.* Lefavour, 11 Metc. 174.

which discount was allowed for prompt payment, and the payment thus made, with the discount allowed, was the exact amount of the goods previously supplied: *Held*, that it was to be inferred that these payments were intended in liquidation of the latter account.[1] "Where there is nothing to show the *animus solventis*, the payment may certainly be applied by the party who receives the money. The payment of the exact amount of goods previously supplied is irrefragable evidence to show that the money was intended in payment of those goods, and that it was made in relief of the surety."

Where an account is delivered by an agent in which he charges himself with a balance, and he continues to receive money for his principal, his subsequent payments are not necessarily to be first applied to the extinction of the previous balance, where the subsequent receipts are equal to the subsequent payments.

It may, in such a case, be properly left to the jury to say how the payment shall be applied.[2] Lord Tenterden said: "Consardine was an agent employed by the defendants in error, for the sale of their bees, at Banogher, from 1817 to 1821. At that time he was indebted to his employers in a balance of £379. He is then sent to Loughrea, holding the same character of agent, accounting to the defendants in error for his weekly receipts, and making to them remittances of the moneys received at Loughrea. The question

[1] Marryatts *v.* White, 2 Stark. 101.

[2] Lysaght *v.* Walker, 5 Bligh. (N. S.) 1.

upon this state of facts is, whether there is an absolute rule of law which requires that the moneys so remitted should be considered as paid in discharge of the balance due on the Banogher account, or whether it may be considered independently as a remittance on account of moneys received for his employers. I think it was properly left to the jury, upon consideration of all the circumstances, to determine upon what account the remittance was made. The judge was not bound to direct the jury to find a verdict contrary to the scheme of the accounts as they appeared in evidence. He was not bound to tell the jury that they should consider the remittance from Loughrea to have been paid by the agent out of his own funds, in reduction of the balance then due his employers."

The debts, although blended in one account, may be separate in their nature, and the creditor's rights may be different, in respect to some of them from what they are as to others.

In such a case, the rule may well be held not to apply.

Thus, the plaintiff served the defendant three years under a covenant, and three and a quarter years more under a simple contract. He received goods and money during the first period in part payment; he also received goods and money during the second period. The whole receipts more than covered the salary due upon the covenant. The parties kept a blended account, and made no rest of it at the end of the first period. The plaintiff brought covenant for

the balance of wages for the first period, and assumpsit for the balance of wages for the last. The defendant attempted to appropriate by set-off to the discharge of the covenant debt; but it was held, *first*, that these were two separate debts and not one account; and, *second*, that the plaintiff had the right to ascribe to the second debt, for which he had the worse security, the value received in the second period; and might, therefore, recover in both actions.[1]

In Stovell *v.* Eade (4 Bing. 154), it was considered that there were sufficient circumstances to disturb this presumption for priority of payment. The defendant being indebted to the plaintiff, gave him a bill of exchange, in 1823, for £2,500 and a warrant of attorney to secure the payment; and, in 1825, by a deed reciting that he was indebted to the plaintiff in the sum of £5,000, he gave a mortgage to secure that sum and any advances to the extent of £10,000. In 1826, the estate so mortgaged was sold for £3,600, and the proceeds paid to the plaintiff, and he, after this, issued an execution on the warrant of attorney. A motion was made to set the execution aside, but the court refused to do so. It was contended by the counsel for the defendant that the case fell within Clayton's Case, but the court thought otherwise, Best, Ch. J., saying: "Is there, then, in the present case, any circircumstance which can enable us to determine whether the payment of the £3,600 was to be applied in any order other than that of priority? It is clear that this sum,

[1] Peters *v.* Anderson, 5 Taunt. 596.

the proceeds of the sale of the Salmon Bridge Estate, was applied towards the discharge of the £5,000 for which that estate was mortgaged, and it nowhere appears that the sum due on the bill of exchange formed any part of that sum; on the contrary, it is treated as a separate transaction."

Where a bond has been given as a continuing security, the transactions under it do not fall within this principle.

Thus, if a bond be given by A. to B. in a specified sum, as and for a continuing security, payments made by A. to B., in their dealings, are not to be applied in immediate and final liquidation of the sum named, or of the first items in A.'s debit; and even if A., on a long course of transactions, should, after the giving of the bond, be for a time in advance to B., the bond is not thereby satisfied.[1]

The same principle was recognized and applied in City Disc. Co. *v.* McLean (9 Law Rep. C. P. 692).

The following qualifications of the rule seem, also, to be established.

Payments will not be applied to any items in the accounts which are barred by the statute of limitations,[2] nor to illegal items.[3]

The principle of this qualification will be considered more at length under a subsequent head.

[1] Hunniker *v.* Wigg, 4 A. & E. (N. S.) 792.

[2] Livermore *v.* Rand, 6 Fost. 85.

[3] *Ex parte* Randleson, 2 Dea. & Chit. 534.

SECOND MINOR RULE.

In the case of indefinite payments, they will be applied first to extinguish interest, and then principal.[1]

The origin of this rule is very ancient. It was called into exercise as far back as the time of Charles II, when the following case occurred: "Judgment was had for principal and interest due on a bond, decreed what sum the creditor had received before the judgment was entered shall go in discharge of the interest, and what he received after the judgment entered shall go, in the first place, to discharge the interest, and then to sink the principal." [2]

The question was referred to the judges of the Supreme Court of New York, at an early day, for the true rule as to the application of payments, where

[1] People *v.* New York, 5 Cow. 331; De Bruhl *v.* Neuffer, 1 Strobh. 426; Stoughton *v.* Lynch, 2 Johns. Ch. 209; Jencks *v.* Alexander, 11 Paige, 619; Steele *v.* Taylor, 4 Dana, 445; Peebles *v.* Gee, 1 Dev. 341; Spires *v.* Hanrot, 8 Watts & S. 17; Hearn *v.* Cutberth, 10 Texas, 216; Hart *v.* Dorman, 2 Fla. 445; McFadden *v.* Fortior, 20 Ill. 509; Gwinn *v.* Whitaker, 1 Har. & J. 754; Frazier *v.* Hyland, 1 Ib. 98; Norwood *v.* Manning, 2 Nott & McCord, 395; Story *v.* Livingston, 13 Pet. 359; U. S. *v.* McLemore, 4 How. (U. S.) 286; Dean *v.* Williams, 17 Mass. 417; Walters *v.* McGirt, 8 Richardson, 287; Jones *v.* Ward, 10 Yerger, 160; Guthrie *v.* Wickliffe, 1 A. K. Marsh, 584; Smith *v.* Coopers, 9 Iowa, 376; Baker *v.* Baker, 4 Dutch. 13; Backus *v.* Minor, 3 Cal. 231; Russell *v.* Lucas, Hempstead, 91; Howard *v.* McCall, 21 Gratt. 205; Johnson *v.* Robbins, 20 La. Ann. 569; Lash *v.* Edgerton, 13 Minn. 210; Smith *v.* Macon, 1 Hill. Ch. 339; Hampton *v.* Dean, 4 Texas, 455; Bond *v.* Jones, 8 S. & M. 368; Moore *v.* Kiff, 78 Penn. St. 96; Fultz *v.* Davis, 26 Gratt. 903.

[2] Crisp *v.* Bluck, Finch, 89.

there were items of principal and interest, and they reported the following,[1] which is believed to be the prevailing rule in ordinary cases everywhere.[2] "To calculate interest on the principal up to the time when the payment has been made, add this interest to the principal, and then deduct the payment without regard to the time when made, whether before or after the expiration of the year. This rule, however, is only to be adopted in cases where the payment exceeds the interest due, otherwise it will be taking interest upon interest. When the payment falls short of the interest due, interest must be calculated on the principal up to the time when the payments will overrun the interest due on the principal debt, and the deduction then be made."

In a very old case in Pennsylvania,[3] it was held by Chief Justice McKean that the rule of computing interest was that the interest of money paid in before the time must be deducted from the interest of the whole sum due at the time appointed by the instrument for making the payment, but this doctrine was overruled in the same volume,[4] and, subsequently, repeatedly in the same State.[5]

It was formerly the custom among merchants, in stating accounts, to let the principal continue upon in-

[1] Williams *v.* Houghtaling, 3 Cow. 86, note.

[2] Bower *v.* Marris, Cr. & Phil. 351; Mills *v.* Saunders, 4 Neb. 190.

[3] Tracy *v.* Wikoff, 1 Dall. 124.

[4] Penrose *v.* Hart, 1 Dall. 378.

[5] Spires *v.* Hanrot, 8 W. & S. 17.

terest, and to compute interest upon the payments as they were successively made. But this method is not correct, nor just to both parties. By it, the debtor gains, and the creditor loses, for it is stated to be susceptible of demonstration that a debt will, by this mode of computation, in the course of a few years (and the time will be longer or shorter, according to the rate of interest), be wholly extinguished by payments of interest, without paying a cent of principal.[1]

Where neither principal nor interest is due at the time of a partial payment, it becomes an interesting question how the payment shall be applied.

In such a case, some of the courts have laid down the rule that the payments will be applied to the extinguishment of principal and such proportion of interest as has accrued on the principal so extinguished.[2]

The point received careful attention in the Court of Appeals of South Carolina, in De Bruhl *v.* Neuffer,[3] and the ruling was substantially in accordance with the rule as just stated. Frost, J., discussed the question in the following manner: "The third ground of appeal presents the inquiry how a payment shall be applied that is made before either principal or interest is due on a bond. The authorities are not very

[1] Stoughton *v.* Lynch, 2 Johns. Ch. 209; Fonbl. Eq. note * to note r, to p. 439, marginal paging; Com. *v.* Miller, 8 S. & R. 452; Hart *v.* Dorman, 2 Fla. 445.

[2] Stone *v.* Seymour, 15 Wend. 19; Miami Ex. Co. *v.* Bk. of U. S. 5 Ham. 260; Williams *v.* Houghtaling, 3 Cow. 86; Jencks *v.* Alexander, 11 Paige, 619.

[3] 1 Strobh. Law, 426.

uniform on this subject. In some cases the payment is treated as a deposit until the principal debt, or the interest becomes payable, and interest is computed on the payment from the time it is made to the end of the year. The interest is also computed on the principal debt to the end of the year, and then the aggregate of the payment and the interest on it is deducted from the aggregate of the debt and interest. Another mode is to credit the payment when made on the aggregate of the principal debt and of the interest computed to the time of payment (Williams *v.* Houghtaling, 3 Cow. 86). The latter mode is best supported by the authorities. The immediate application of the payment towards the discharge of the debt seems most consistent with the intention of the party in making it, and with the general rule by which payments are first applied towards the extinguishment of the interest. This mode is also more simple and common. When neither principal nor interest is due, there is no rule of law to determine the application of a payment to either in preference of the other. Where, therefore, a payment is made on a bond before either principal or interest is due, and the debtor does not direct the application, it should be deducted from the aggregate of the principal and interest due at the time of payment, if the payment exceeds the amount of interest then due, and if the payment does not exceed the interest then due, it should be applied to the extinguishment of the interest then due."

A different rule prevails in Illinois, where it has been held that if a creditor receives money before it is due, on a demand drawing interest, such payment, in the absence of an agreement to the contrary, should be applied to the extinguishment of the principal.[1] Walker, J., said: "It appears to be more equitable and just that when the holder receives money before it is due on a demand drawing interest, it should be applied to the principal. Otherwise, by loaning the money thus received, he would, in effect, compound the interest, or have placed at interest before its maturity a larger sum than his original claim. In other words, he would receive money on the maker's money as well as on his own. After both principal and interest became due, it would be otherwise."

About two-thirds of the sum secured by a mortgage was paid at a time when a small amount was due for interest, and when no part of the principal (which was payable in annual installments) was actually due, and there was no direction given by the debtor, nor any actual application of the payment made by the creditor. The court felt that the law must make the application, and that after discharging the interest due the balance must be applied ratably to the exoneration of each and all of the installments of principal secured by the mortgage.[2]

Where the interest is payable annually, the rule

[1] Starr *v.* Richmond, 30 Ill. 276.

[2] Righter *v.* Stall, 3 Sandf. Ch. 608.

seems to be that the interest on the principal bears simple interest from the time it falls due till it is paid, and when partial payments are made they apply first in payment of the interest due on interest, second in payment of interest due on the principal, and third in payment of the principal, but in no case can any part of the interest upon interest be made to bear interest.[1]

The foregoing rule for the computation of interest is applied to analogous cases.

Thus, in the settlement of a partnership account where one partner has advanced money to the firm to be paid back with interest, the application of partial payments will be made in the same manner as in other contracts, that is, first to the extinguishment of interest, and then to the principal.[2]

It will also be applied to the payment of a legacy by an executor, where partial payments have been made by him, viz., the payments will be appropriated to extinguish the interest due at the date of payment, and the residue, if any, to the extinguishment of principal.[3]

And in England, the rule is in vogue in the case of the estates of bankrupts, when there is more than twenty shillings in the pound paid, or where there is a claim over against some other party. This

[1] Anketel *v.* Converse, 17 Ohio St. 11.

[2] Stewart *v.* Stebbins, 30 Miss. 66.

[3] Johnson *v.* Johnson, 5 Jones Eq. 167.

was settled by Lord Hardwicke's order in 1743,[1] and has been repeatedly recognized since.[2]

In analogy with this rule, applying payments to interest in preference to principal, is another one, that in the case of different demands owing by a debtor, some of which bear interest and others do not, indefinite payments will be ascribed by the court to the interest-bearing debts, rather than those not carrying interest.[3] The rule, in such cases of debts of unequal bearing, consequences, and burden on the debtor who makes a payment, does not leave the creditor to apply the money to his open, unliquidated account, not pressing nor bearing interest, in preference to a demand bearing interest.

Where partial payments are made upon open account, the law, in the absence of any legal appropriation of these by the parties, will apply them to the different items which bear interest in the order in which they fall due.[4]

In the case of a judgment affirmed with ten per cent. damages, an indefinite payment will be applied in discharge of the interest on the original judgment first, and then to the debt due on such judgment, and lastly to the damages awarded.[5]

[1] Bromley *v.* Goodere, 1 Atk. 75.

[2] Bower *v.* Marris, Cr. &. Phil. 351.

[3] Bussey *v.* Gant, 10 Humph. 238; Heyward *v.* Lomax, 1 Vern. 24; Blanton *v.* Rice, 5 Mon. 253; Scott *v.* Fisher, 4 Mon. 387.

[4] Scott *v.* Cleveland, 33 Miss. 447.

[5] Hamer *v.* Kirkwood, 25 Miss. 95.

This rule contemplates only legal interest, and has no reference to illegal or usurious interest.[1]

Although it may be true that by law partial payments must be first applied to the interest, and the party receiving them would have the right so to apply them, yet this would not be the case with illegal interest. The law does not apply payments to illegal purposes.[2]

In the case of a usurious security, where the duty of applying some payments which had been made devolved on the court, an appropriation was made of them in satisfaction of the money loaned, and legal interest.[3]

The rule, thus expounded as between parties themselves, is not necessarily transferable to other parties, and the application of it was refused where the relation of attorney and client existed between the parties before the court, and the payments were of moneys collected by the attorney, it not appearing that the attorney had used any of the moneys for his own use, or manifested any disposition so to use them.[4]

[1] Parchman *v.* McKinney, 12 S. & M. 631.

[2] *Per* Sharkey, Chief Justice, in Parchman *v.* McKinney, *supra.*

[3] Bartholomew *v.* Yaw, 9 Paige, 165.

[4] Smith *v.* Lloyd, 11 Leigh, 512.

THIRD MINOR RULE.

In case of payments, and application by neither party, the court will make the application in accordance with a principle which requires that the debts which have the most precarious security shall be first extinguished.[1]

One of the oldest authorities upon this point in this country is Field *v.* Holland (6 Cranch, 8), in which Ch. J. Marshall used the following language: "It is contended by the plaintiffs, that if the payments have been applied by neither the creditor nor the debtor, they ought to be applied in the manner most advantageous to the debtor, because it must be presumed such was his intention. The correctness of this conclusion cannot be conceded. When a debtor fails to avail himself of the power which he possesses, in consequence of which that power devolves on the creditor, it does not appear unreasonable to suppose

[1] Briggs *v.* Williams, 2 Vt. 283; Moss *v.* Adams, 4 Ired. Eq. 42; Field *v.* Holland, 6 Cranch, 8; Blanton *v.* Rice, 5 Mon. 253; Watt *v.* Koch, 25 Penn. St. 411; Pierce *v.* Sweet, 33 Penn. St. 151; Terhune *v.* Colton, 1 Beasley Ch. 232; Peters *v.* Anderson, 5 Taunt. 596; Thomas *v.* Kelsey, 30 Barb. 268; Burks *v.* Albert, 4 J. J. Marsh, 97; Hilton *v.* Burley, 2 N. H. 193; Mathews *v.* Switzler, 46 Mo. 301; Planters' B'k *v.* Stockman, 1 Freeman's Ch. 502; Gaston *v.* Barney, 11 Ohio St. 506; Ramsour *v.* Thomas, 10 Ired. Law, 165; Johnson's Appeal, 37 Penn. St. 268; Vance *v.* Monroe, 4 Gratt. 52; Sager *v.* Warley, Rice's Eq. 26; Bell's Law of Scotland, par. 562; Hargroves *v.* Cooke, 15 Geo. 321; State *v.* Thomas, 11 Ired. Law, 251; Bean *v.* Brown, 54 N. H. 395; Langdon *v.* Bowen, 46 Vt. 512.

that he is content with the manner in which the creditor will exercise it. If neither party avail himself of his power, in consequence of which it devolves on the court, it would seem reasonable that an equitable application should be made; it being equitable that the whole debt should be paid, it cannot be inequitable to extinguish first those debts for which the security is most precarious."

In Pierce *v.* Sweet (33 Penn. St. 151), the Court said: "Another rule of the common law is, that when no application is made either by the debtor or the creditor, the law will apply the payment in the way most beneficial to the creditor, and therefore to the debt least secured, unless to the prejudice of a surety. It is true there are exceptions to the current of decisions, but the authorities greatly preponderate in favor of the doctrine."

We will refer to one or two more cases.

"The courts are bound to carry into effect," remarked Turner, J., of the Supreme Court of Vermont, in Briggs *v.* Williams,[1] "the object of the law, that is, so to apply the payment that the creditor may obtain satisfaction of his debt."

In Stamford B'k *v.* Benedict (16 Conn. 437), the court knew of no better administration of the principles of equity, in case of non-appropriation by either party, than so to direct the application of the money paid by the debtor, or received from other sources by

[1] 2 Vt. 283.

the creditor, as that under all the circumstances the greatest equity shall be done, or the mutual intention of the parties, at the time of the payment, if it can be ascertained, shall be best carried out. * * * The result of the operation of this principle will be, as it frequently has been, that in some instances payments will be applied upon the oldest demands, and sometimes upon the most precarious debts.

In Harker *v.* Conrad (12 S. & R. 301), the court regarded the question, first, from the standpoint of the debtor, and then from that of the creditor, and, finally, from that of even-handed justice between them. Said Gibson, J.: "Where neither party has made the application, the law presumes, in ordinary cases, that the debtor intended to pay in the way which, at the time, was most to his advantage. Thus, if it were peculiarly the interest of the party to have the money received in extinguishment of a particular demand, the law intends that he paid it in extinguishment of such demand, and that the omission to declare his intention was accidental. Where, however, the interest of the debtor could not be promoted by any particular appropriation, there is no ground for a presumption of any intention on his part, and the law then raises a presumption for the same reason that the payment was actually received in the way that was most to the advantage of the creditor. * * * The law ought to presume, and does presume, that every man is governed by the dictates of conscience,

and that he will do what honesty requires of him, even though it be against his interest."

The doctrine is put very strongly in favor of the creditor in a case in South Carolina:[1] "As between the parties themselves it would be difficult for the debtor to satisfy the conscience of any just man, that when he has made a general payment, without directing its application, the court should not so apply it as to promote to the highest degree the interests of the creditor."

Equally strong is the language of Johnson, J., in a recent case[2] in the Supreme Court of the State of New York: "The other claims were secured by the mortgage. This was not, and, I think, that had King even paid the indorsed notes before this even came to his hands, equity would apply it to the satisfaction of this unsecured debt, and for the simple reason that the other demands were secured by the mortgage, and without such application the creditor would suffer the loss of a part of his debt. It scarcely needs authority to support so plain and just a proposition. * * * The law will never presume that the debtor intended thus to prejudice his creditor, but will rather presume that he intended so to apply his money and property as to discharge all his obligations."

Lastly, the point was ably discussed by Currier, J., in the case of Mathews *v.* Switzler,[3] on appeal to the

[1] Sager *v.* Warley, Rice's Eq. 26.

[2] Thomas *v.* Kelsey, 30 Barb. 268.

[3] 46 Mo. 301.

Supreme Court of Missouri: "The substantial question here is, shall the original creditor, who holds all the notes, have the full benefit of all the securities which he took for his own protection? He was not satisfied with the security of the deed of trust, and therefore required an additional name upon one of the notes. He testified, and without objection, that he intended the additional name as a security additional to the deed of trust, and the transaction, upon its face, suggests as much. In the meantime, he has surrendered no security and done nothing to prejudice the right of the surety upon the note. And since his debt is not paid, he now calls upon the surety to make good the unpaid balance to the extent of the sum called for upon the face of the note sued on."

The facts in Johnson's Appeal[1] were quite similar in substance to those just stated, and the same principle was applied by Strong, J.: "The matter is, however, set at rest by the agreement of the parties contained in the mortgage. They contemplated, as the language of that instrument shows, that payment of the debt existing at the time it was given should be extended, that other and future advances should be made, and that the mortgage should continue to be a security to the extent of $25,000. What was this but an agreement that in the anticipated continuance of the course of dealings between the parties, any payments or credits of the mortgagor should not be ap-

[1] 37 Penn. St. 268.

plied to the extinguishment of the mortgage security while there were other debts unsecured. The application which the appellant seeks to have made is, therefore, in conflict with the understanding at least, if not the agreement of the parties, and it is such as the law will not enforce."

After this explication of the doctrine, a few instances of its practical application will not be out of place.

Where a creditor has two claims against the same debtor, one well secured and the other not, upon a payment being made, the court will apply the same to the debt for which no security was taken[1]—to an open account rather than a judgment for the payment of which the creditor has security, although the judgment be older than the account.[2]

In a case of a party owing two notes, one of which is secured by a surety, making a general payment, and the creditor not applying it, the court will direct its application on the note which was not indorsed.[3]

The holder of different notes secured by deed of trust may apply the entire proceeds of sale under the deed to the payment of those last maturing, and will not be prevented thereby, either in law or equity, from obtaining judgment against a surety on the note first falling due, and which was the only note indorsed.

[1] Planters' Bk. *v.* Stockman, 1 Freem. Ch. 502.

[2] Watt *v.* Koch, 25 Penn. St. 411.

[3] Burks *v.* Albert, 4 J. J. Marsh. 97; Hargroves *v.* Cooke, 15 Geo. 321.

In an action against the indorser of a promissory note to recover an installment due thereon, it appeared that when previous installments had become due, of the non-payment of which the indorser had not been duly notified, the indorsee had applied the proceeds of a mortgage given by the maker to secure the payment of the note to such installments: *Held*, that the indorsee had the right so to apply them.[1]

In analogy, it is conceived with the principle of this rule, it has been ruled that, in case of a general payment, the court will so apply it as not to deprive the party receiving it of a meritorious right of set-off in some matters between them.[2]

And, also, in an action by a principal to recover goods tortiously delivered by his factor to the defendant, it was decided that a payment which had been made by the factor to his principal on a running account of consignments, there having been no appropriation of the payment by the parties to any particular items of the account, would not be applied in satisfaction of the charge for the goods sued for.[3]

The doctrine conveyed by this rule is in direct antagonism to the favorite tenet of the civil law, that the debtor was to be specially protected, and is avowedly and designedly in the interest of the creditor.

Quite a long list of cases, therefore—such as Gwinn

[1] Fitchburg *v.* Davis, 121 Mass. 121.

[2] Lindsey *v.* Stevens, 5 Dana, 104.

[3] Benny *v.* Rhodes, 18 Mo. 147.

v. Whitaker (1 Har. & J. 754), Dorsey *v.* Gassaway (2 Id. 402), Baine *v.* Williams (10 S. & M. 113), McLaughlin *v.* Green (48 Miss. 175), Neal *v.* Allison (50 Id. 175), Bussey *v.* Gant (10 Humph. 238), The Antarctic (1 Sprague, 206), Heyward *v.* Lomax (1 Vern. 24), Pattison *v.* Hull (9 Cow. 747), Dows *v.* Morewood (10 Barb. 183), and Miller *v.* Trabue (16 La. Ann. 375), holding that in case of a general payment by a debtor to a creditor having different claims, one of which is secured and the other not, the payment will be applied to the demand for which the creditor holds security in preference to the unsecured one—is at variance with a clear preponderance of authority.

Of course, the law in this respect will not be changed in Louisiana, where the civil law has been bodily adopted, nor, probably, in Maryland, Mississippi or Tennessee, where the rule has either been repeatedly declared or treated as settled, but the case of The Antarctic, and the cases of Pattison *v.* Hull and Dows *v.* Morewood must be regarded as overruled in their respective jurisdictions; the former case as being in contravention of superior federal court authorities, and the latter two cases as being repugnant to the spirit of numerous adjudications in the State of New York.

FOURTH MINOR RULE.

In case of the office of making application devolving upon the court, the law will apply the payment to that one of the creditor's claims which is legal in preference to one which is not enforceable by law;[1] *to a certain or conceded one instead of an indefinite or disputed one;*[2] *to an existing demand rather than a future or contingent one,*[3] *or one not yet due;*[4] *and to a transaction affecting the party directly and personally and not collaterally, or in some other capacity.*[5]

1. *To a legal demand.*

Upon this subject there is an old English case.

The statute of 7 & 8 W. III, c. 4, made it unlawful for a candidate to furnish provisions to *any* voters after the teste of the writ. In an action brought by an innkeeper against a candidate, for provisions so furnished at his request, after a payment by the candi-

[1] Wright *v.* Laing, 3 B. & C. 165; Treadwell *v.* Moore, 34 Me. 112; Bachman *v.* Wright, 27 Vt. 187; Bancroft *v.* Dumas, 21 Vt. 456; Stanley *v.* Westrop, 16 Texas, 200; Seymour *v.* Marvin, 11 Barb. 80; Caldwell *v.* Wentworth, 14 N. H. 431.

[2] Ramsour *v.* Thomas, 10 Ired. Law, 165; Bell's Law of Scotland, par. 562; Blinn *v.* Chester, 5 Day, 166.

[3] McDonnell *v.* Montgomery, 20 Ala. 313; Thomas *v.* Kelsey, 30 Barb. 268; Harrison *v.* Johnston, 27 Ala. 445; Birch *v.* Tebbutt, 2 Stark. 74; Lamprell *v.* Billericay, 3 Excheq. 383.

[4] Lebleu *v.* Rutherford, 9 Robinson, 95; Hunter *v.* Osterhoudt, 11 Barb. 33; Bobe *v.* Stickney, 36 Ala. 482.

[5] Newman *v.* Meek, 1 S. & M. Ch. 331; Merrimack Co. Bank *v.* Brown, 12 N. H. 320.

date to the innkeeper upon an account which contained some such items in it, and other items that were legal, and no application by either party, the court ruled that it was not competent for it to apply the payment to the former items,[1] Lord Chief Justice Eyre remarking, "with regard to the money paid into court it is to be observed that such payment is only an admission of a legal demand and we cannot allow it to be applied to an illegal account."

In Wood *v.* Barney (2 Vt. 369), the court held that the law would not apply a payment to an account for spirituous liquors, where the statute of the State prohibited a recovery for more than one dollar and a half, and neither party had appropriated the payment. Prentiss, J., said: "As the articles delivered by the appellant were charged generally in account, and no specific application had been made of them by the parties, they remained with the rest of the accounts to be adjusted and settled as the law required. To apply the payments in the appellant's account in off-set to, or extinguishment of, the charges for liquors in the intestate's account, as was done by the auditors, would be in effect to allow the representative of the intestate to recover the amount of the account for liquors. This would be a palpable evasion, if not a direct violation of the statute."

A similar ruling was made in Minnesota.[2]

[1] Ribbans *v.* Crickett, 1 B. & P. 264.

[2] Solomon *v.* Dreschler, 4 Minn. 278.

Where a party owes an account, consisting partly of legal charges, and partly of illegal charges, as for liquors unlawfully sold, and makes a general payment, it must be applied by the court to the legal charges, but if it exceed the legal part of the account it will be applied to the illegal charges rather than be deferred for future legal charges.[1]

The law is equally stringent in the case of another kind of an invalid demand, viz., a usurious one.

Thus it has been decided that the holder of a usurious mortgage cannot, even with the assent of the mortgagor, apply partial payments to the unsound part of his mortgage for the purpose of keeping it alive, that part of it which is valid, to the prejudice of an existing subsequent mortgage.[2]

In case of a general payment upon a contract carrying usurious interest, the law will apply the payment to the principal sum loaned if that can be collected.[3]

And when notes were given in payment of an account at a usurious rate of interest, after which one of the notes was paid, *held*, that the payment should be applied upon the amount legally due upon the aggregate account, and not as a payment of the usury in the note thus paid.[4]

[1] Hall *v.* Clement, 41 N. H. 166.

[2] Green *v.* Tyler, 39 Penn. St. 361; Stanley *v.* Westrop, 16 Texas, 200.

[3] Gill *v.* Rice, 13 Wis. 549.

[4] Burrows *v.* Cook, 17 Iowa, 436.

Where money has been paid by a company to its solicitors, on account of costs generally, and there were costs incurred in respect of unauthorized business by the company, and known by the solicitors to be unauthorized, and the solicitors had omitted until too late to make the application, the court refused to apply the payments on the costs for the unauthorized business, but applied them to the costs which the company were liable to pay.[1]

But the law will make the application where the demand, although not strictly collectible, is supported by a moral obligation.

Thus, application will be made of a payment upon a debt from which the debtor has been discharged in bankruptcy proceedings, where the circumstances make such a disposition equitable, and where a contrary ruling would work injustice.[2]

So, if a debtor owes some debts longer than six years, and others not so long, a general payment by him will be a payment on account, so as to take the older debts out of the statute.[3]

Upon the same principle, where at, the time the payment was made, the debtor owed the creditor two demands, both then due, and afterwards, but before the appropriation was made by the court, one of these demands was barred by the statute of limitations, or

[1] Howard & Dolman's Case, 1 Hem. & Mill. 433.

[2] Hill *v.* Robbins, 22 Mich. 475.

[3] Mills *v.* Fowkes, 5 Bing. N. C. 455.

of non-claim, it was thought that justice between the parties seemed to require that the payment should be applied to the debt thus barred.[1]

And where a party was bound in two debts on two different accounts, one of which the creditor had agreed not to sue, but which the debtor had agreed to pay, and the latter made general payments, the court applied them to the non-suable account, and held the debtor for the balance of the other account.[2]

2. *To a certain demand.*

When the law is called upon to make application, the appropriation can only embrace debts or demands for certain sums, or such as can be made certain, as accounts for work and labor, or for goods sold, or the like, but not for uncertain and unliquidated damages.[3]

In the case of a debt existing between the parties on a special contract and an unsettled book account also standing between them, and a general payment by the debtor on the special contract, it will be applied on that and not on the book account.[4] The Court said: "In this case there does not appear to be any debt due to the plaintiff from the defendant, except what arose out of the contract. It is true there was an unsettled account, but from this no inference can be

[1] Robinson *v.* Allison, 36 Ala. 525.

[2] Emery *v.* Tichout, 13 Vt. 15.

[3] Ramsour *v.* Thomas, 10 Ired. Law, 165.

[4] Blinn *v.* Chester, 5 Day, 166.

made that the defendant was in arrear on that account to the plaintiff. It might as well be inferred that the plaintiff was in arrear to the defendant. There was then no debt due but that upon the contract. There was no need of any direction to the plaintiff to apply the payment to this debt. The law made the application of it to this."

A., having a legal claim against B., on bills of exchange accepted by B., and also having possession of a deed of mortgage executed by B. to a third person, of which he might compel an assignment in equity, B. pays money to A. "on account," without prejudice "to his claim on any securities." The law will apply the payment to the bills of exchange.[1] *Per* Lord Ellenborough: "I cannot go beyond the terms of the receipt. 'On account' there means an account on which the defendant was liable to pay, but he was liable on the bills of exchange only. Then there was this qualification, 'without prejudice to any claim we have upon any securities.' But they were not in a situation to make any claim on any other securities."

For a similar reason it was held, in Goddard *v.* Hodges (1 C. & M. 33), that a general payment must be applied to a prior legal, and not to a subsequent equitable demand. Bayley, B., said: "If there be a legal debt, and a claim which would only become a legal debt on a settlement of the partnership accounts,

[1] Birch *v.* Tebbutt, 2 Stark. 74.

and the striking of a balance, we are bound to consider a general payment as applicable to the legal debt."

3. *To an existing demand.*

In the absence of evidence showing most unmistakably the intention of the parties, a general payment to a creditor with whom the debtor has a running account will be referred to his existing indebtedness, and not to future liabilities or advances.[1]

The doctrine, as thus enunciated, was applied to dealings between a party and his commission merchant.[2]

In the case of general payments made by a tenant on account of rent, they will be applied by the law on the rent due at the time, and not on the rent then accruing.[3]

4. *To the transaction affecting the party directly and personally.*

Where a party was indebted on his own account and also collaterally as surety for another party, and made payments without specifying the mode of appropriation, it was held that, under such circumstances, the law would apply the payment to the party's own debt, and not the one for which he was surety.[4]

[1] Early *v.* Flannery, 47 Vt. 253.

[2] Harrison *v.* Johnston, 27 Ala. 445.

[3] Hunter *v.* Osterhoudt, 11 Barb. 33.

[4] Newman *v.* Meek, 1 S. & M. Ch. 331.

The same principle was applied in the case of Merrimack Co. Bk. *v.* Brown (12 N. H. 320), where a creditor had a mortgage to secure two or more notes, on some of which the mortgagor was principal alone, and on another he was joint principal with another person. The court ruled that the creditor could not apply the proceeds of a sale of the mortgaged premises in payment of the whole of the note, in which the two were joint principals, to the prejudice of the sureties of the other notes; that the law would apply the property, in the first place, to the payment of the actual debt of the mortgagor. In the course of his opinion, Chief Justice Parker said: "The bank evidently had no interest which required the application which was attempted, having the same sureties on the one note as on the other; and the law, under such circumstances, will apply the mortgaged property, in the first place, to the payment of the debt of the mortgagor and the exoneration of his sureties, and not to the payment of that portion of the indebtedness on which he was in truth a surety for Smart."

By parity of reasoning, where a party holds claims in the double character of a direct right and a collateral or representative right, general payments will be applied to the debts to him in his own right.

Thus, it is said, if there be no appropriation of a payment by either of the parties, the law will appropriate it, other considerations being equal, in the first instance, to the payment of a note absolutely due to

the creditor, rather than of one transferred to him as collateral security only.[1]

But the dealings between the parties may be so shaped as to require a different adjudication by the court, and an old case is an instance of such.

A. was indebted by bond (in which J. S. was bound as surety) and also by simple contract to B. A. stated an account of both debts with B., and made a bill of sale for securing the balance, which proved deficient. On a bill by the surety, it was decreed that the money arising by the bill of sale should be applied towards the discharge of both debts, in proportion, and solely upon this reason, that both of the debts had been cast into one stated account, and the bill of sale made towards satisfaction of the whole debt.[2]

[1] Bank of Portland *v.* Brown, 9 Shep. 295.

[2] Perris *v.* Roberts, 1 Vern. 34.

FIFTH MINOR RULE.

In some cases the fund out of which the money arose will direct the application.

That is, if the money came from the proceeds of some particular property, real or personal, or from some particular fund, and there be a debt resting on that property or fund, or owing in consequence of it, the debt thus described will be first discharged or reduced from the money thus raised.

As where A. is indebted on bond and on judgment, and sells his land, and the purchaser pays a sum of money to the creditor without application, the law will appropriate it to the judgment in exoneration of the land.[1]

A very old case affords a happy illustration of this principle. It is thus reported by Vernon: "On exception to a master's report to whom the account in question was referred, it appeared that the defendant was an incumbrancer by judgment, and had also a debt by bond, and received £200 of the purchaser of the estate in part, but gave no notice to the purchaser that it was to be applied towards payment of the bond debt. *Per curiam*, it shall therefore be applied towards satisfaction of the judgment, the £200 being part of the purchase money.[2]

[1] Gwinn *v.* Whitaker, 1 Har. & J. 754; Allston *v.* Contee, 4 Id. 351.

[2] Brett *v.* Marsh, 1 Vern. 468.

The same principle runs through a much later case:

A. B., an equitable mortgagee, lent the title deeds to C. D., the mortgagor, to enable him to arrange a sale of the property. C. D. was indebted to A. B., both on the mortgage and on a trade account. C. D. paid to A. B. a part of the produce of the sale, but there was no evidence of his having made any express appropriation of that payment: *Held*, that it must be understood that the payment was made on the mortgage account, and that A. B. had no right to appropriate it to the trade account. Lord Langdale, Master of the Rolls, thus expressed his views on the matter: "In support of his claim, in that respect, he alleges that nothing was said as to the application of the money which he received, and he insists that in the absence of express directions he has a right to make the application most beneficial to himself. But it appears to me, from the nature of the transaction, that English paid this money only in respect to the plaintiff's right to the mortgage, and that it must, from the circumstances, be understood that English meant the payment to be applied towards the satisfaction of the mortgage."[1]

In Merrimack Co. Bk. *v.* Brown,[2] a creditor held a mortgage on land to secure two or more notes, on some of which the mortgagor was principal alone,

[1] Young *v.* English, 7 Beav. 10.

[2] 12 N. H. 320.

and on one of which he was joint principal with another person. It was adjudged that he could not apply the proceeds of a sale of the mortgaged premises in payment of the whole of the note, in which the two were joint principals, to the prejudice of the sureties on the other notes. Chief Justice Parker said: "The bank had no right to apply the proceeds of the sale of the farm, which belonged to John Brown, in payment of the joint note of Brown and Smart, to the prejudice of the sureties on the other note. It is, in effect, an appropriation of the property of Brown to the payment of the debt of Smart, he being solvent, the bank at the same time holding a debt against Brown, and attempting to enforce the collection of it from his sureties. Perhaps the bank might have made the application to Brown's half of that note, but the proceeds of the sale were sufficient to pay that in addition to the note now in suit."

The principle is reiterated in Hicks *v.* Bingham,[1] where Putnam, J., declared for the court that they were "all of opinion that the respondent is bound to apply the consideration, which she received for a release of a part of the mortgaged premises, towards payment of the mortgage. It was received by her in consequence of the mortgage, and the price of the land mortgaged, as well as the rent of it received by the mortgagee, ought to be applied towards the extinguishment of the debt secured by the mortgage."

[1] 11 Mass. 300.

Lord Justice Knight Bruce voiced the principle very epigrammatically in Knight *v.* Bowyer,[1] when he remarked that "it may well be that an incumbrancer is bound to apply what he receives by virtue of his security, to the security by virtue of which he receives it."

The principle is as active in courts of law as in courts of equity, as will appear from the case of Stoveldel *v.* Eade.[2] Defendant, being indebted to the plaintiff, gave him a bill of exchange, in 1823, for £2,500, and a warrant of attorney to secure the payment; and in 1825, by a deed reciting that he was indebted to the plaintiff in the sum of £5,000, he gave a mortgage to secure that sum and any advances to the extent of £1,000. In 1826 the estate so mortgaged was sold for £3,600, and the proceeds paid to the plaintiff. After this, the plaintiff having issued execution on the warrant of attorney, the court refused to set it aside. It was claimed by counsel that the case fell within Clayton's Case, and that, therefore, the oldest item should be considered discharged; but the court thought otherwise, Best, Chief Justice, saying: "Is there then, in the present case, any circumstance which can enable us to determine whether the payment of the £3,600 was to be in any order other than that of priority? It is clear that this sum, the proceeds of the sale of the Salmon Bridge estate, was applied towards

[1] 4 De G. & J. 619.

[2] 4 Bing. 154.

the discharge of the £5,000, for which that estate was mortgaged, and it nowhere appears that the sum due on the bill of exchange formed any part of that sum; on the contrary, it is treated as a separate transaction."

This principle is applied also in analogous cases.

Thus, when a partner in trade liable for a sole debt, contracted before his partnership, and also liable for partnership debts, pays money to the creditor on account, the creditor cannot apply such payment to the first debt if the money paid was in fact the money of the partnership.[1] Lord Chief Justice Abbott gave the reason as follows: "The general rule certainly is that, when money is paid generally, without any appropriation, it ought to be applied to the first items of the account, but the rule is subject to this qualification, that when there are distinct demands, one against persons in partnership and others only against one of the partners, if the money paid be the money of the partners, the creditor is not at liberty to appropriate the same to the payment of the debt of the individual, for this would be allowing the creditor to pay the debt of one person with the money of others."

This rule appears to possess a strong equity. It also admits of easy application, and seems to be attended with fewer exceptions and limitations, in its use, than any other of the rules which we are considering.

A case arose recently, within the knowledge of the

[1] Thompson *v.* Brown, 1 Mood. & Malk. 40.

author, in the Supreme Court of New York, presenting a very peculiar state of facts, and which, if it had proceeded to trial and adjudication would, in his opinion, have fallen within the rule under present consideration. The case, after being in court a short while, was compromised and settled.

The president of a manufacturing corporation, formed under the general law of New York, and who was also a large stockholder, in the absence of funds in the treasury of the company, fitted up, with his own private means, a factory with machinery and other apparatus for manufacturing the products of the company, and also furnished funds for purchasing the raw materials which the company used in its business and for the general current expenses of the company. This was done under an informal understanding with the other officers and stockholders, that he should be reimbursed as fast as the business of the company would permit.

He took the bills for the purchases of the factory machinery, &c., in his own name, and those for the raw materials and current expenses in the name of the company. When the factory was ready for use the business of manufacturing and selling was started there, and continued for several years in the name of the company, the president being the chief manager and financial officer thereof. The business was conducted very informally, no books of account, in the debit and credit form, between him and the company being kept

by him, nor on the part of the company, although he preserved accurate private memoranda of all the transactions.

He superintended the manufacture and sale of the products of the concern and received all payments therefor. Matters went on in this manner for about four years, the advances of this officer in the several ways mentioned exceeding his receipts from the business largely, and more than the cost of fitting the factory up with machinery, &c.

Some third persons, in the meantime, got possession of the factory property under execution process against the company, and trover was brought against them by the vendee of the president.

The case would probably have turned upon the question whether the claim for fitting up the factory was to be deemed to have been extinguished by the course of the transactions.

Neither party had, at any time, attempted to make any express application of the receipts or payments which had come into the hands of the creditor, and from the nature of the case there could not, perhaps, have been any such, for the creditor standing in the position of a trustee of the company could not have acted for himself and to the neglect and prejudice of the interests of the company, and the company had no direct representative to look after its behalf. It would thus necessarily have been a case for appropriation, by the court, upon equitable principles.

Had the title to the factory property been passed upon, its purchase to the company, the party advancing the money would have been a general creditor only, or one having merely a general claim against the company, and upon such a state of facts the rule of Clayton's Case would probably have been applicable, and the items for this property being the first in point of time would have been the first to be cancelled by receipts from the sales of the company's products.

But the circumstance that this property was only conditionally sold to the company and the title never passed, would present an equity which would probably have distinguished it from, and taken it out of, the ordinary rule.

And yet had an account, in the debit and credit form, been kept openly by the creditor, in which were entered in due form his advances or disbursements on the one side and his receipts on the other side, then, according to the case of Crompton *v.* Pratt (105 Mass. 255), *supra*, the rule of Clayton's Case would have been applicable, and the items in question would have been extinguished and the property paid for.

The case cited from Massachusetts did not deny that the sale before it was a conditional sale, or decide that the conditions need not be fulfilled, but held that the course of the transactions constituted a payment and showed that the condition had been performed.

But the matter in the case under review, not

resting in the form of an account current kept by the creditor, upon which consideration the case cited from Massachusetts chiefly turned, and nothing having been done by the parties, or either of them, to impress it with any artificial characteristics, it would seem to have been one in which the rule under consideration should be allowed to exercise a controlling influence, viz., that the source from which the moneys came should determine what items of the creditor's claim were to be treated as discharged, and which ones were to be regarded as still unpaid.

If so, the action which had been instituted in the Supreme Court would seem to have been sustainable, for the receipts by the creditor having been for the manufactured products of the company, should have gone in discharge of the advances for raw materials and general expenses which had been transformed by the process of manufacture into such second form products, and not in cancellation of the items for factory machinery, none of which had been sold, but all of which remained in the possession of the company up to the time of the levy.

CHAPTER XI.

IN REGARD TO PARTNERSHIP CASES.

THE occasions for the appropriation of payments in partnership transactions are quite frequent, so much so as to justify a distinct and separate space for them, although no unusual principles or modes of application are called into requisition.

In Simson *v.* Ingham,[1] Bayley, J., after reciting the two rules of appropriation, such as, first, by the debtor, and, second, by the creditor, stated that there was a third rule, viz.: "Where one of several partners dies, and the partnership is in debt, and the surviving partners continue their dealings with a particular creditor, and the latter joins the transactions of the old and the new firm in one entire account, then the payments made from time to time by the surviving partners must be applied to the old debt. In that case it is presumed that all the parties have consented that it should be considered as one entire account, and that the death of one partner has produced no alteration whatever;" but it was held that this rule was inapplicable to the case at bar, for the reason that the creditor had separated the accounts of the new and old firm, and had applied the payments made by the

[1] 2 B. & C. 65.

later firm to the indebtedness of that firm, as he had a right to do.

Smith *v.* Wigley[1] presented a state of facts suitable for resort to the rule enunciated by Bayley, J. W. & T., partners, doing business as news agents, became indebted to the plaintiff. The firm dissolved, and after the dissolution T., continuing the business, became also indebted on his separate account to the plaintiff: *Held*, that in the absence of any specific appropriation by either party, payments made by T. after the dissolution must go in reduction of the entire account, and consequently must discharge the earlier items. Lord Chief Justice Tindall, commenting on the facts, said: "I desire to be understood as not deciding this case upon the construction of the bill of particulars, but upon the general rule of appropriation which the law directs in the absence of any specific appropriation by the parties themselves, according to the rule laid down in Clayton's Case, Bodenham *v.* Purchas, and in Simson *v.* Ingham. The case of Thompson *v.* Brown cannot apply, because Tunnicliffe was liable to the plaintiff for the entire debt due upon both accounts." Mr. Justice Park was of the same opinion, remarking that he could not distinguish the case from Bodenham *v.* Purchas and Simson *v.* Ingham.

In Simson *v.* Cooke,[2] there was a very similar con-

[1] 3 Moore & Scott, 174.

[2] 1 Bing. 452.

dition of affairs, and a like ruling was made. Lord Gifford, Chief Justice, among other things, said: "The only remaining question is, whether, on the evidence adduced at the trial, any part of the balance due from Cooke & Co. at the time of the death of Thomas Cooke is still due. Now, at the time of his death no rest or distinction was made in the accounts, but they still went on as if nothing had happened, and the remittances subsequent to the death of Thomas Cooke are more than sufficient to cover the balance then due. Several cases have been referred to, particularly that of Bodenham *v.* Purchas, which establish it as a principle that where a debtor makes no specific appropriation of a sum remitted to account, the creditor is bound to apply it in liquidation of the earliest balance due from the debtor. That principle applies here."

In Pemberton *v.* Oakes,[1] Hooper *v.* Keay,[2] Toulmin *v.* Copland,[3] and Bank of Scotland *v.* Christie,[4] the facts were not distinguishable in substance from those in Smith *v.* Wigley and Simson *v.* Cooke, and a similar ruling was made in all of the cases: in the first by Lord Chancellor Lyndhurst; in the second by the Court of Queen's Bench; in the third by the Court of Exchequer, and in the last by the House of Lords. In Toulmin *v.* Copland, the rule was declared to be

[1] 4 Russ. 154.
[2] 1 Law Rep. Q. B. Div. 178.
[3] 3 Y. & C. 625.
[4] 8 Cl. & Fin. 214.

applicable not only between the partners themselves, but also between the partners and third persons.

In Toulmin *v.* Copland, Lord Chief Baron Abinger gave the subject a very thorough discussion, and this is his language: "It appears that a controversy arose in what way the balance due from the old customers to the house should be treated. By the old customers I mean those who dealt with the first firm. It appeared that soon after they commenced their partnership, balances were transferred from the books of the old firm to the books of the new, both those balances that were for the firm and those that were against the firm, so that the house of Toulmin & Copland undertook to liquidate the balances due from the house of Abraham & Richard Toulmin, and likewise proposed to the creditors of that house that they would be responsible to them for the debts due from the old house. This result is the necessary consequence of the change in the house, as will immediately be seen by attending to the operation of the accounts. A customer of the house, who might owe a certain sum of money to the old house, finds himself addressed by the new house with a statement to this effect, that the new house is now formed and they propose to carry on the same concern, and that they have transferred his balance to their accounts, and have rendered him a new account, the first item of which debits him with the balance due to Abraham & Richard Toulmin. That forms the first item on the debit side of the

account, and that account is opened with the new house of Toulmin & Copland. Then they introduce other payments made to him and payments made by him on the credit side of the account, and at the end of the year they draw a balance, and they charge him as debtor to the new house with that balance. That balance includes the interest of the debt to the old house. The account is carried on from year to year, and in that manner for several years. Now it is quite obvious that, as between the debtor and the creditor, that balance becomes absorbed and discharged by the first payments that are made in point of time that are applicable to it, and the account assumes altogether the shape of an account between the new parties. It is no longer an account between the former house and the customer, but an account between the new house and the customer; and the customer in effect engages to pay the new house what he before owed the old house, and pays accordingly upon a general account what he pays in. That is the necessary and legal consequence of the form of the account (without referring to the rule laid down by Sir William Grant in Clayton's Case, which is now become thoroughly understood and acted upon in all courts of justice). From the very nature of the account, without the application of any legal rule, the old balance becomes a balance in which the new house is interested, and becomes absorbed and satisfied by the subsequent payments made, unless there be some agreement to the contrary. So, on the other hand,

with respect to the accounts of the creditors of the house. Some customers of the house have money in their hands. The house renders accounts to those customers, giving them credits for the money which the old house owed to them, and carrying on the account with them, soliciting a continuance of their favors, and making themselves their debtors." The decision of the Court of Exchequer was affirmed by the House of Lords.[1]

The reasoning of Lord Cottenham, in the House of Lords, in the Bank of Scotland *v.* Christie, although somewhat lengthy, is worth transcribing here. "The question which it seems expedient to consider in the next place, is whether, at the time of the date of the second bond, anything was due to the Bank of Scotland from the estate of Thomas Allen alone. The bond of the 30th of March, 1832, was to secure repayment to the bank of any balance to the extent of 20,000*l.*, which might be due to the bank from the firm of Robert Allen & Son, in which Thomas Allen was a partner, in respect of advances and an accommodation to be afforded to them by the bank. Thomas Allen died in September, 1833, and beyond all doubt by that event the firm of Robert Allen & Son, as it had up to that time existed, was dissolved so far as it affected the bank. That the business was to be considered as going on as before, for the purpose of settling between the surviving partners and the estate of

[1] 1 West, 164.

the partner deceased, by special agreement between the partners, cannot affect the question; and it is also quite clear, that the security which Thomas Allen so gave to the bank, to secure the repayment of advances made to the firm in which he was a partner, that is to himself and his partners, could not be used as a security for advances made after his death to a firm in which he was not a partner, that is to the persons who had been his partners, whether they continued the old style and firm or adopted another. Now it is not in dispute that the payments made by the surviving partners, with whom the account was continued, after Thomas Allen's death, to the bank, without any specific appropriation prior to the date of the second bond, exceeded the amount of the debt due to the bank at the time of Thomas Allen's death, and the appellants admit that there were periods between the time of Thomas Allen's death and the date of the second bond at which there was no balance due to the bank, and that at the date of the second bond there was only a balance of 400*l.* with interest due, so that there is no ground upon which it can be maintained that the debt due at the death of Thomas Allen was not paid at the date of the second bond, except that of the bond of 1832 being available to secure advances made after the death of Thomas Allen, for which there is no pretence. It seems to have been supposed by some of the learned judges that the case of Devaynes *v.* Noble (Clayton's Case) was not applicable to the

present, because this was a case of credit and not of deposit. Those learned judges recognize the law of Devaynes *v.* Noble as applicable to Scotland, as indeed the case of Spiers *v.* Houston (4 Bli. 515) assumes it to be. It is to be regretted that the subsequent decisions, which have taken place in England upon that subject, were not brought under the consideration of those learned judges. If they had been I have no doubt but that the application of the principle, in its full extent, to this case, would have been recognized by them. Many such cases have occurred in this country, but it is sufficient to mention Pemberton *v.* Oakes, Bodenham *v.* Purchas, and Simson *v.* Ingham, because in one or other of those cases all the circumstances occurred which have been supposed to distinguish this case from the case of Devaynes *v.* Noble. Without, therefore, calling in aid the fact that the whole debt, at the time of Thomas Allen's death, was destroyed by the balance due to the bank from the continuing firm having ceased to exist, such debt so due at Thomas Allen's death would have been discharged by the application of the subsequent payments of such debt, such payments having been made without any appropriation by the parties paying, and having been carried by the parties receiving such payments to the account kept by them, consisting of the old and new transactions, and constituting, therefore, a continuing account, and from which appropriation it was not competent for the bank to remove such pay-

ment at a subsequent time, when the consequences were seen, as was decided in Bodenham *v.* Purchas."

In Brooke *v.* Enderby[1] and Scott *v.* Beale,[2] this principle was extended to the case of a new party coming into the partnership, and declared to be not limited to the knowledge, by the customers of the old firm, of the fact of such new entry. Erle, Chief Justice, in Scott *v.* Beale, referring to Bodenham *v.* Purchas and Clayton's Case, observed, that in none of the cases was knowledge by the customer, of the entry of the new partner, ever considered as an ingredient in the question of his liability.

The rule, as thus extended, was applied by the Court of Common Pleas, in Geake *v.* Jackson,[3] to a mining company conducted on the cost book principle.

The doctrines which we have been considering have been accepted by the courts of this country.

In Allcott *v.* Strong,[4] it was decided by the Supreme Court of Massachusetts, that if A. receives partnership notes in payment of his demands against the firm, and after its dissolution opens a running account with the continuing partner, by whose consent the amount paid by A., to take up said notes upon their dishonor, is charged in such running account, it is the duty of the jury, in a suit by A. on such notes against the retiring partner, to apply any general pay-

[1] 2 Brod. & Bing. 70.
[2] 6 Jurist. (N. S.) 559.
[3] 36 L. J. (C. P.) 108.
[4] 9 Cush. 323.

ments made by the continuing partner to A., after the notes are so charged, to the earliest items of debit in said account, and if the general payments so made are sufficient to extinguish the notes and all earlier items in the account, to find such notes were paid. Shaw, Ch. J., in the course of his opinion, used the following language: "This point was elaborately discussed, and a great many authorities were cited in regard to it, but it seems to depend on well settled principles. The outstanding debts of the dissolved firm were charged by their creditor, Whitney, to the partner who continued the business. Now, according to the rule laid down in the absence of other proof, such a charge transfers the account to the party undertaking to pay it. The earliest credits in the accounts must be applied to meet the earliest debits, and if those debits are joint they are met and extinguished by the credits. This was decided in Clayton's Case, Bodenham *v.* Purchas, and Farnum *v.* Boutelle (13 Metc. 159). It is the ordinary way in which accounts are managed at the dissolution of copartnerships."

The Supreme Court of Connecticut gave the question a many sided discussion in Fairchild *v.* Holly.[1]

In an action of book debt against B. C. & D., partners, A. exhibited his account, consisting of sundry charges for goods sold and delivered at different times, from June, 1830, to August, 1832,

[1] 10 Conn. 175.

amounting to $813, with credits of cash at sundry times during the same period, to the amount of $529, the account being an entire one, without any rest being made or balance struck. After a part of the goods charged had been furnished, C., who was a secret partner, withdrew from the concern, after which B., who made all the purchases, paid to A. the moneys credited in the account. These moneys, if applied to the charges which accrued before C. withdrew, would extinguish that part of the account, leaving a balance in favor of A. on the other part only. There having been no application of the moneys so paid at the time of payment, *held:*

1st. That the rule, that money paid is to be applied to the benefit of the fund from which it was taken, was inapplicable to this case, the plaintiff's case being entire, and the funds of the defendants undivided.

2d. That the rule, that money paid is to be applied to that debt for which there is the least security, was inapplicable, because it did not appear but that the company was abundantly solvent after C. withdrew, or that the absence of his name lessened the security.

3d. That the rule, that money paid on an account is to be applied to the oldest items, was applicable to the case, and the moneys credited in the plaintiff's account were so applied.

As to the first ruling Bissell, J., said: "No new

partner had come in; no new funds were thus created; the business underwent no visible change, and the members of the new copartnership, or rather the remaining members of the old firm, are presumed to have been in possession of the funds of the firm, so far at least as those funds were required for the payment of its debts. And Holly still continuing to be the agent may be presumed to have had the control of those funds for that purpose. Indeed, the presumption would seem to be that these funds belonged to the old rather than to the new firm, as by reason of C.'s retiring it would seem to be necessary that the debts due to that firm should be called in, in order to the payment of its own debts, and the final settlement of its own concerns."

As to the second ruling, the learned judge remarked: "Admitting the correctness of the principle, it may be remarked that there is nothing in the case before us which either demands or warrants its application. There was no evidence offered at the trial which went to prove that the plaintiff's security was in the least impaired by reason of C.'s withdrawing from the copartnership. There was no pretence that the remaining partners were not abundantly responsible. Some foundation should have been laid for the application of the principle, at least by evidence tending to show that the security of the creditors was lessened by the fact in question. Both debts are of the same character; they are both evidenced in the same

manner; they both stand on the same ground as to the proof of their existence, and both, for aught that appears, are against persons of abundant responsibility. The rule cited therefore does not apply."

Coming to the last ruling, after citing Simson *v.* Ingham and Clayton's Case, the learned judge referred to Brooke *v.* Enderby (*supra*), and was unable to distinguish it from the case at bar, and accordingly concluded that it was decisive of the same.

Morgan *v.* Tarbell[1] and Allen *v.* Brown[2] rested upon facts similar to those in Brooke *v.* Enderby and Scott *v.* Beale (*supra*), and evoked a similar decision.

But the application of this rule was disallowed in the case of a dissolution of a copartnership and subsequent dealings by the remaining partners, where the debts due to the old firm were secured, and the new debts to the remaining partners were not secured.[3] In such a case a new element enters into the case.

Where, however, the transaction is an insulated one between the parties, and not a matter during a continuous dealing between them, different principles apply.

Thus, the payments and credits made by one partner after a dissolution of the partnership and joint agency, and after a new individual agency in him, cannot rightfully be applied to the extinguishment of

[1] 2 Williams, 498.

[2] 39 Iowa, 330.

[3] Schenk's Appeal, 33 Penn. St. 371.

a debt of the partnership, unless the attendant circumstances justify a presumption that the debt of the partnership has been adopted as his individual debt, and brought into the account as such, or the payments and credits were intended by the parties to be so actually applied.[1]

And where one was indebted to a firm, and during the existence of it delivered flour, bacon and other articles to one of the partners, which it was understood between them should be received in payment of the partnership demand, the debtor was pronounced discharged on the ground of payment, and the circumstance that the articles were applied to the individual use of the partner receiving them did not vary the case.[2]

A partial payment made by a party who was indebted severally and also jointly with another, to the same creditor, for items of book charges, is to be applied on the several debts, unless a different appropriation is proved to have been intended at the time of the payment.[3]

[1] Gass *v.* Stimson, 3 Sumn. 98; Thompson *v.* Brown, 1 Moody & M. 40; Sneed *v.* Weister, 2 A. K. Marsh, 277; Johnson *v.* Boone, 2 Harring. 172.

[2] McKee *v.* Stroup, 1 Rice's Law, 291.

[3] Livermore *v.* Claridge, 33 Maine, 428.

CHAPTER XII.

ON OFFICIAL BONDS.

The cases of official bonds, or bonds given by officers with sureties for the performance of official duties, exhibits the most unsettled condition of the law which exists upon this whole subject.

In the case of a single bond, or where there is only one set of sureties, the question is, ordinarily, a very simple one, and is governed by some of the rules which have appeared in the course of the preceding pages, usually the rule in Clayton's Case.

But when there is more than one set of sureties, and, as oftentimes occurs, there are two or three sets, whose interests are very materially affected by the opposing claims and contentions among themselves and of their creditor, the question becomes a very different one, and has led to a wide variance of opinion among the courts.

In such a case, several new elements enter into the problem. The money which the debtor uses, and with which he makes payment, is not his money in the sense of ordinary transactions, but is money towards which he occupies a sort of fiduciary relation. His sureties also may, perhaps, be said to be differently obligated from the ordinary guarantors of debts,

and to be invested with peculiar and stronger equities. The claim, in this latter respect, was well put by counsel in a recent Virginia case,[1] when they contended that in the instance of a receiver of public moneys, who has given a bond, with security, to account for them, the officer and the State do not stand in the relation of debtor and creditor, and that the sureties in the bond have a direct interest in the moneys, and that there can be no other application of them than in accordance with the conditions of the bond. The creditor, moreover, is not the ordinary private creditor looking after his individual interests only, but is, usually, the government or some other public corporation, representing and being the guardian of large and complicated interests.

Some of the courts have regarded these cases as disclosing mere questions of dry, legal reasoning and logic, the same as between individuals, and have disposed of them by simply applying some one or other of the familiar rules pertaining to the appropriation of payments, whilst others have considered the argument as branching out into questions of public convenience and policy on the one hand, or as demanding on the other hand, in behalf of the sureties, the exercise of an enlightened and expansive equity.

In attempting to give a clear idea of the present state of the law, and of the different steps or stages through which it has reached that condition, we shall

[1] Chapman *v.* Com. 25 Gratt. 721.

indulge in copious extracts from the language of the judges themselves. Such a course will be more just to them than any synopsis of ours, and will also produce a more lively representation of the various arguments which have been elicited by this discussion. It can hardly fail to be alike entertaining and instructive to the student and to the thinker to be led directly and closely to the different standpoints from which this question has been regarded by the numerous judicial minds which have taken part in the controversy.

There is a noticeable dearth of decisions among the English cases. We have met with but two which bear particularly upon this question, and they present hardly any of the points which have agitated the American courts. The first of these cases is Collins *v.* Gwynne,[1] the facts of which were as follows: C., who had been appointed a tax collector, entered into a bond with B. as his surety for the due and faithful payment to the receiver general, according to the intent of the act of parliament under which he had been appointed, of all moneys collected by R., upon the days and at the times required by the act. The moneys received by the tax collector for the service of the year during which B. was his surety, were as to part paid over by him to the receiver general to the service of that year, and the residue of the moneys so received were paid by B. to the service

[1] 9 Bing. 544.

of former years, during which time R. had also been tax collector, but B. had not been his surety. It was held that the payment by the tax collector, for the year for which B. was his surety, to the account of different years, was a breach of the condition for due payment, and that B. was liable for the amount of such payments, and that the receiver general was justified in applying the money according to the express directions of the tax collector, though some of those payments went in exoneration of sureties of former years.

The other case is Att'y-Gen. *v.* Manderson,[1] and was an appeal to the privy council from the Supreme Court in Jamaica. M. was surety in a bond given by G., the collector of taxes in Jamaica, for payment of the collections for the year 1842. G. was, at the date of the bond, in arrears for taxes collected by him in 1841. Shortly after the collection of taxes for 1842 the receiver general pressed G. for the payment of the arrears of 1841, whereupon the latter sent him £5,000 from the moneys collected in 1842. The receiver general immediately appropriated the entire amount to the arrears of 1841. The Court, in Jamaica, charged the jury that if G. did not expressly assent to such an appropriation by the receiver general, they ought to find for the defendant, which direction was held, on appeal, to have been erroneous. Lord Campbell delivered

[1] 6 Moore's P. C. C. 239.

the opinion of the privy council, holding first, that there had clearly been no appropriation by the tax collector of the remittance to the taxes of 1841, and second, that there had been an appropriation of it to the arrears of 1841, by the receiver general, at least, and that there was an absolute right of appropriation in him. "If, therefore," said he in conclusion, "this was appropriated to the arrears of the year 1841, there are now arrears for the year 1842, and for those arrears the surety is liable."

In deciding these cases, it will be perceived that the court resorted simply to the ordinary powers of appropriation belonging to the parties, in the first case beholding it exercised by the debtor, and in the last by the creditor, and that it did not proceed beyond these considerations.

We now turn to the American decisions, and will commence with the Federal courts.

U. S. *v.* Kirkpatrick and others,[1] is a case often referred to. It was an action by the United States against the defendants as the obligors of a bond given by them conditioned for the faithful discharge of the duties of the office of collector of direct taxes and internal duties by the principal obligor, who had been appointed by the President, in November, 1813, and was to hold his office until the end of the next session of the Senate. On the 24th January, 1814, he was reappointed by the President, and confirmed

[1] 9 Wheat. 720.

by the Senate, and received a new commission and gave a new bond. The court held, Mr. Justice Story delivering the opinion, that in such a case of long and running accounts, where balances were adjusted, from time to time, merely for the purpose of making rests, the law would apply the payments to extinguish the debts according to the priority of time, so that the credits were to be deemed payments *pro tanto* of the debts antecedently due.

U. S. *v.* January,[1] is the case which foreshadowed the controversy upon which we are entering. It was an earlier case than U. S. *v.* Kirkpatrick. A collector of revenue had given two bonds for his official duties at different times, with different sureties, and their interests clashed in this action. It was thought *per curiam* that the rule adopted in ordinary cases was not applicable to one circumstanced like this, that moneys arising due and collected subsequently to the execution of the second bond, could not be applied to the discharge of the first bond without manifest injury to the surety in the second bond, and *vice versa.*

The question recurred in U. S. *v.* Eckford's Ex'rs,[2] upon a state of facts substantially identical with those in U. S. *v.* January. In the meantime, a difference of opinion had manifested itself among the circuit and district judges, which we will notice hereafter, and the court felt called upon to define its doctrine clearly.

[1] 7 Cranch, 572.

[2] 1 How. 250.

Clayton's Case was cited by counsel, and referred to in the decision of the court, but was considered inapplicable, and the doctrine previously promulgated in the January case was reaffirmed and adopted as the true one. Mr. Justice McLean delivered the opinion of the court, and discussed the question at great length. "The treasury officers," said he, "are the agents of the law. It regulates their duties as it does the duties and rights of the collector and his sureties. The officers of the treasury cannot, by any exercise of their discretion, enlarge or restrict the obligation of. the collector's bond, much less can they, by the mere fact of keeping an account current in which debits and credits are entered as they occur, and without any express appropriation of payments, affect the rights of sureties. The collector is a mere agent or trustee of the government. He holds the money he receives in trust, and is bound to pay it over to the government as the law requires. And in the faithful performance of his trust the sureties have a direct interest, and their rights cannot be disregarded. It is true, as argued, if the collector shall misapply the public funds, his sureties are responsible. But that is not the question under consideration. The collector does not misapply the funds in his hands, but pays them over to the government without any special direction as to their application. Can the treasury officers say, under such circumstances, that the funds currently received and paid over, shall be appropriated in discharge of a

defalcation which occurred long before the sureties were bound for the collector, and by such appropriation hold the sureties liable for the amount? The statement of the case is the best refutation of the argument. It is so unjust to the sureties, and so directly in conflict with the law and its policy, that it requires but little consideration. If the collector be in default for a preceding term, it is the duty of the treasury department to require payment from him and his sureties for that term. To pay such defalcation out of accruing receipts during a subsequent term, even with the assent of the collector, would be a fraud upon the sureties for such term. The money in the hands of the collector is not his money. Without a violation of his duty he cannot appropriate it as such. He pays it over in the performance of his duty—the duty which the sureties have undertaken that he shall faithfully perform. And shall not the sureties be exonerated? The collector has done all that they stipulated he should do. How, then, can they be made responsible? On the 29th of March, 1834, a new official term of Swartwout commenced, and new sureties were given (the defendants in this action). On that day a large apparent balance was due to the government by him. Now, the inquiry should be, of what did that balance consist? Did it arise from a misapplication of the public money during the preceding term? If so, the sureties of the preceding term are liable for the amount

thus misapplied. But if there was no misapplication of the public money by the collector, and he paid over to the government, or to its order, all the moneys he received during the official term for which the defendants were his sureties, however such payments may have been appropriated by the treasury, the sureties are discharged. The court consider the official terms as distinct and separate, in regard to the sureties, as if different persons had served in the three terms specified, that the legal responsibilities are not, and cannot be, affected by any action of the treasury department. If liable, the sureties are made so by their contract, and the government, being a party to that contract, cannot, without the consent of the defendants, change its legal or equitable effect."

In Jones *v.* U. S.,[1] the doctrine of the last preceding case was again reaffirmed with emphasis, so that it may now be regarded as firmly established law in the Federal courts. Mr. Justice Daniel, in the course of his opinion, employed the following language in regard to the proposition: "In instances of official bonds executed by the principal at different times, with separate and distinct sets of sureties, this court has settled the law to be that the responsibility of the separate sets of sureties must have reference to, and be limited by, the periods for which they respectively undertake by their contract, and that neither the misfeasance nor non-feasance of the principal, nor

[1] 7 Howard, 681.

any cause of responsibility occurring within the period for which one set of sureties have undertaken, can be transferred to the period for which alone another set have made themselves answerable. Such is the rule established in the cases of the U. S. *v.* January, and the U. S. *v.* Eckford."

Intermediate, the cases of U. S. *v.* January and the one last cited, there was a decided antagonism among the circuit and district courts.

In Postmaster-General *v.* Furber,[1] there were two bonds of a postmaster, with different sureties, and the contest was, between them, whether payments by the officer on general account after the giving of the second bond should be applied to extinguish the prior balance, or were to be applied in discharge of the balance of postages received since the second bond was given, and the first proposition was held by Judge Story, on the authority of Clayton's Case.

U. S. *v.* Wardwell,[2] was another ruling of Mr. Justice Story, and was quite peculiar in its facts. It was a case of two bonds given by a purser in the navy, which were held to be successive. The principal obligor died insolvent, and his administrator made a payment and claimed that it should be applied on a balance due during the lifetime of the first bond. Judge Story discussed the bearing of the death and insolvency of the principal obligor upon the case, and arrived at the

[1] 4 Mason, 333.

[2] 5 Mason, 82.

conclusion that those facts would demand the application of all payments by the administrator, *pro rata*, toward the extinguishment of all the debts due to the creditor. Turning, then, to the question which we are considering, the eminent judge said: "But another ground of defense supersedes or rather renders the former unimportant. It appears that the accounts of the treasury have run on from time to time ever since the first appointment, charging him with advances made and crediting him with disbursements. Balances have been struck from time to time, and the balances have been again carried forward to the debit side of the new account. It is therefore the common case of a running account, where there are various debits and credits on each side, and the question is, in such a posture of things, where there has been no specific application made of any payments by either party to any specific items, how the payments thus passed into general account are to be deemed, in point of law, to have been applied. My opinion is, that they are to considered as applied in discharge of the items antecedently due in the order of time in which they stand in the accounts. This is the natural, and, I think, the legal result of carrying the credits into general account. The doctrine of Clayton's Case is directly in point, and stands upon irresistible reasoning. It is confirmed, if confirmation were necessary, by Bodenham *v.* Purchas, Simson *v.* Cooke and Simson *v.* Ingham."

Mr. Justice Woodbury was of a similar opinion in Boody *v.* U. S.,[1] and discriminated against the case of U. S. *v.* Eckford. "The test," he remarked, "of the exception to the ordinary rule in the case of different bonds and commissions, is that money actually collected and accruing under one, cannot be applied to the other without the consent of all concerned. But here there is no evidence whatever, that the small balance due after the 12th of July, as the payment then made, was from money accruing under the second appointment. Indeed the presumption is evident that it could not be, as it was so much larger than the ordinary receipts during only twelve days."

On the other hand, Mr. Justice McLean, in his capacity of Circuit Judge, held, in the case of Myers *v.* U. S.,[2] in advance of his opinion in U. S. *v.* Eckford, that where a question arises between liabilities of securities on different bonds, of different dates, the general doctrine of the application of payments did not apply, and that the government could not appropriate money paid over by a receiver of public moneys, after the date of the bond in discharge of a previous defalcation, to the prejudice of the new sureties.

To the same effect was the ruling of Hopkinson, District Judge for the Eastern District of Pennsylvania, who, in the case of Postmaster-General *v.* Norvell,[3] a case of different bonds with different sure-

[1] 1 W. & M. 150.

[2] 1 McLean, 493.

[3] Gilpin, 106.

ties, charged the jury in accordance with the law in the January, Eckford, and Myers' Cases (it was prior to Jones *v.* U. S.), and summed it all up by declaring it as his opinion most clearly "that each set of sureties must answer for its own default, and is entitled to be credited with its own payments."

We shall discover a similar tendency to diversity of opinion, and an equal contrariety of decisions among the State courts.

The Supreme Court of Massachusetts, in Colerain *v.* Bell,[1] in 1845, took ground precisely the opposite of the doctrine of the Supreme Court of the United States. It was there held that where the same person was collector of town taxes for two successive years, and paid to the town the arrears of taxes collected on the tax list of the first year, with the money collected on the tax list of the second year, the town not knowing whence the money came, and failed to perform the conditions of his official bond for the second year, his sureties on that bond, when sued for his default, were liable to the extent of the default, and were not entitled to deduct the amount so paid by him for the taxes of the first year. In adopting this strong doctrine, the court did not, in its opinion, discuss or even mention any of the cases in the Federal courts, or those of sister States, although several of them were cited by counsel upon the argument. Dewey, J., disposed of the point as follows:

[1] 9 Metc. 499.

"The only remaining question is as to the deduction claimed on account of certain sums received by the collector on the taxes for the year 1841, and applied by him in part of arrearages due from him on the tax bill of the previous year. It is to be remarked that the case is not one of fraudulent appropriation by the payee in derogation of the rights of the sureties. The case discloses no knowledge on the part of the town, of the source whence the money was derived, which was applied in part payment of the taxes of 1840. Neither is it a case of misapplication of any specific funds which the collector was bound to pay to the treasurer of the town. *The specific money received by a collector in the collection of taxes, is his money, and not that of the town.* Such being the case, and the payment thereof being received by the town on account of arrearages of taxes of 1840, it cannot be said to be such a misapplication of payment that it should be withdrawn from its original application and applied to the taxes of 1841."

There would not probably be universal acquiescence in the propositions conveyed in the sentences above italicized, and which are evidently laid down by Mr. Justice Dewey, as postulates. There would seem to be great room for the assertion that such money is not the individual money and property of the officer, in the same sense and to the same extent that the money of a debtor in private life is, drawn from his personal business or individual property, and paid

over by him in such a character to a creditor in like position, and that therefore the rules of application established in such cases and founded, as upon a corner-stone, upon the right of a party to do as he chooses with what is absolutely his own, would not necessarily be pertinent. At the same time there is difficulty on the other hand in pronouncing such money, while in the process of collection by the officer and payment over to the town, to be the money of the town. How can that be positively asserted until the money has come into the possession and under the control of the town? There are many cases however, like that of U. S. *v.* Wardwell (*supra*), of a purser in the navy, in which the moneys handled by the officer is specifically that of the government, and delivered, in the first instance, directly by the government to the officer. So that the rule of the court in the case we are considering, if resting on this position of Mr. Justice Dewey, and even if correct in the case in which it originated, could not perhaps be extended to all cases.

The doctrine advanced in Colerain *v.* Bell, was reaffirmed in the subsequent case of Sandwich *v.* Fish,[1] and may be stated as settled in that State. Chief Justice Shaw delivered the opinion of the court, and on this point expressed himself as follows: "The first ground of defence is payment, or in other words that the payments made to the town, by the collector, for

[1] 2 Gray, 298.

the four years, exceeded the tax bills during those years. The bond of the collector is undoubtedly for each year, and would not of itself render the collector and his sureties liable for the balance of the account of a previous year. It does not appear, and it is not material to the decision, whether the sureties of Fish, for the years previous to 1847, were the same or not. But the general rule in the appropriation of payments, is that money not otherwise appropriated by either party is to be applied to the earliest debt. And that rule applies here. When accounts are settled yearly, and the balance transferred to the new account, if no appropriation is made of the payments by the parties, they must be applied in the order of priority, so that each payment shall go to discharge the earliest debit. The balance due on each year's account previous to the last, being extinguished by the payments, the deficit falls on the last year" (citing Colerain *v.* Bell).

Preference has been given to the rule as settled in Massachusetts by the courts of Pennsylvania, although the decisions have not been so uniform in the latter State as in the former. In Speck *v.* Com.,[1] which was a case of collector of tolls for several successive years, with a new bond each year having different sureties, the court applied the payments in the ordinary manner. Kennedy, J., who delivered the opinion of the court, treated the point under present discussion as follows: "If the fact were, and

[1] 3 W. & S. 324.

there had been evidence tending to prove it, that the whole moneys received during that year had been duly paid by him into the State treasury, there might have been great equity in favor of making the appropriation claimed on behalf of the sureties. But no evidence was given, it would seem, tending distinctly to establish the fact. Although the evidence showed that he had paid moneys into the treasury during that year, of, perhaps, greater amount than what he had received for tolls, yet it did not appear from what source they came. But it appeared that during the two previous years he had failed to pay the amount of the tolls received by him, from which it was necessarily to be inferred that he had appropriated the money so received to his own benefit, or put it out to use. And as it thus appeared incontestably that he had been in the practice of using the moneys received by him in payment of tolls, it became impossible to say that the moneys thus paid by him were derived from those sources to which he had misapplied the moneys received by him for tolls during the former year."

In Com. *v.* Rietzel,[1] the court seemed to recede from the doctrine of Speck's Case, and held that in an action against the surety of a receiving officer of the government, upon his official bond, the defendant was entitled to have the moneys received and paid by the official during the year he was surety appropriated to his re-

[1] 9 W. & S. 109.

lief, although it might appear that the officer was a defaulter for several preceding years. Kennedy, J., also delivered the opinion in this case, and, after citing approvingly the foregoing cases from 7 Cranch, and Gilpin, said, in conclusion: "But the account being made out in the form of a general account current, commencing with the year 1839, and closing with the year 1843–4, throws the accumulated balance for this whole period upon the defendant, who was surety only for the last year. This would be so abhorrent to every principle of justice, and even contrary to what was intended, as it would appear from the form and manner of stating and settling the account, that it can, and ought, not to be allowed or sanctioned."

But in McKee *v.* Com.[1] the court returned to the doctrine of Speck's Case, and reaffirmed it, with some remarks by Lewis, J., who delivered the opinion of the court, pretty nearly as strong in regard to the power of the principal debtor in such cases over the appropriation of moneys in his hands as anything to be found in the Massachusetts cases. Referring to U. S. *v.* Eckford, the learned justice said: "We see no objection to this principle. So long as the moneys received can be identified as those actually accrued and received from a particular term, they ought to be applied to discharge the obligation of the sureties for that term. The moneys were the moneys of the United States. The collector was but the agent, and

[1] 2 Grant's Cas. 23.

any appropriation of them to discharge other liabilities was a misapplication prohibited by law. But where the debtor intermingles the public money with his own, or the receipts of one year with those of another, so that their identity is lost, the equity of the surety necessarily falls with the means of enforcing it, and the case then stands under the rule for appropriating general payments to debts according to priority of date. The surety has no equity which entitles him to invert this order of application to the injury of the creditor. If the principal does not think proper to appropriate his payments in relief of his sureties in equal proportions, they are in no worse condition than if he had made no payment whatever. He had the power to misapply the funds, and they voluntarily placed themselves in his power. This is a hardship in which they have no right to expect the creditor to participate, and this is especially the case where the creditor is the State, whose difficulties in the collection of her revenues ought not to be embarrassed for the purpose of adjusting such supposed equities between the different sureties of her collectors and receivers. Whatever may be the rule in the United States courts, the principle appears to be settled in Pennsylvania in accordance with these views (citing Speck's Case). That case is directly in point, and rules the one before us."

The inclination in the State of New York is towards the doctrine of the Federal courts. Seymour

v. Van Slyck, reported in the Supreme Court in 8 Wend. 403, and in the Court for the Correction of Errors, in 15 Wend. 19, under the name of Stone *v.* Seymour, is the only reported decision in that State. It was a case of successive bonds of a collector of canal tolls with different sureties. Payments had been made during the latter terms which it was claimed should be appropriated on preceding terms. As to some of these payments, although there were no express directions for appropriation by the debtor, the amounts were so correspondent with certain items on the other side of the account, that the courts held that there was satisfactory evidence from such circumstances of an intention on the part of the debtor to make such an application, and that he had this power of appropriation in such cases. As to other payments which the courts regarded upon the evidence as unappropriated, the doctrine of the Federal courts was called into requisition. The case was decided in the Supreme Court in January, 1832, and in the Court of Errors in December, 1835, and these decisions were, consequently, between the cases of Kirkpatrick and January on the one hand, and Eckford's Case on the other hand. In the Supreme Court, Sutherland, J., who delivered the opinion of the court, stated his views in the following form, after referring to the case of U. S. *v.* Kirkpatrick: "There can be no objection to this principle in the ordinary cases of debtor and creditor, where the whole indebtedness is from

the same individual. But in a case like this, where, although the account is continued and unbroken, there has, during its progress, been a change of sureties, I am inclined to think the principle ought not to be applied. So far as the parties have not, either expressly or by necessary implication arising from the circumstances of the case, applied the payments, it is obviously just and equitable, as it regards the sureties, that each should have the benefit of the amount actually received by his principal during the period of his suretyship, so far as it can be ascertained, and such was the doctrine of the Supreme Court of the United States in the U. S. *v.* January." The decision of the Supreme Court was affirmed in the Court of Errors. Senators Maison and Tracy read opinions for reversal: the former favoring the doctrine of U. S. *v.* January, and claiming that it had not been carried out to its full extent in the case at bar; and the latter inclining to those cases which applied the ordinary rule of appropriation irrespective of the different sets of sureties. Chancellor Walworth gave expression to the prevailing sentiment of the court by an opinion which ranks among the highest upon this whole subject of application of payments, both for its scholarship and masterly reasoning. In regard to the particular point under consideration the learned Chancellor said: "Amid these conflicting opinions and contradictory decisions, it will not be strange if we should not be able to find any other rule to govern this anomalous case, and to

apply the payment of June, 1826, than to apply it equitably, having, at the same time, a due regard to the rights of all concerned. Equality among creditors and sureties is equity, and if there was any reason for supposing that this payment was made out of the moneys received for tolls during the boating season of 1825, as well as in the spring of 1826, or that it was the collector's own money, the equitable rule would be to appropriate it ratably between the three bonds, so as to give to the sureties in each bond the benefit of the payment in proportion to the amounts for which they were severally holden. But if the payment was made out of the moneys received for tolls in the spring of 1826, all of which except $557 90 was received after the sureties in the third bond became answerable for the faithful appropriation of the money collected by Van Slyck, it would not be equitable to apply any of the proceeds of those tolls to relieve the sureties in the first and second bonds from their liabilities for the tolls of the previous year, which had been wasted or misapplied."

The question has undergone an extended discussion in Missouri. The courts of that State show a decided leaning towards the doctrine of the Federal courts, but with considerable modifications and limitations; and also concede to the debtor, in such cases, a very full power of appropriation.

Draffen *v.* City of Booneville[1] is the first reported

[1] 8 Mo. 395.

case. The official was a collector of taxes for the years 1839 and 1840, giving a bond each year, with different sureties. The fiscal year commenced on May 3d. On the 3d of May, 1840, the defendant was charged, on the register's books, with a default of $1,437, and this balance was carried over to his account in 1840. The tax books in 1840, placed in the defendant's hands and charged to him, amounted to $2,631 84, and, during that year, he paid over and was credited with $3,003. At the end of the fiscal year of 1840 there was a general balance struck against him of $1,070. The question was, whether the sureties for 1840 were liable for this balance, it not appearing from what source the moneys paid during the fiscal year of 1840 were derived. Napton, J., in delivering the opinion of the Supreme Court, examined the merits and demerits of the various rules very closely. "The injustice," said he, referring to the ordinary rule, "of applying an iron rule of law, established for the convenient settlement of accounts between individuals and partnerships, to similar transactions between governments and corporations and their agents, so as to impose upon the last securities the burden of every default committed by their principal, whether during the term of their responsibility or that of their predecessors, is most obvious and apparent, and could only be tolerated because of some great principle of public policy which it may be thought to promote. If an abandonment of the rule were likely to jeopardize the public interests,

and lead to embarrassment in fixing the liabilities of public officers, there would be strong inducements for its enforcement, notwithstanding it might appear harsh and inequitable in individual cases. But such results should appear inevitable to authorize a court to adopt, without qualification, a rule which works such manifest injustice. May it not be assumed that prompt settlements and strict accountability are more beneficial, both to the government and the agent, than the establishment of the rule in question, and that such settlements are not likely to be enforced, when it is made an object of indifference to the government, reposing with confidence on the solvency and sufficiency of existing securities, and regardless of the past? That the sureties of the collector, upon his bond, are not responsible for defalcations occurring during his first term, before the commencement of their liability, is so apparent that no one denies it; but when difficulties arise in ascertaining at what period the default occurred, in the confusion of a general account, running through successive terms, guaranteed by different securities, it is proposed to cut the gordian knot by the application of a rule which works invariable injustice. We are asked to adopt a rule exactly the reverse of the general maxim, 'that a public officer is presumed to do his duty,' and presume him guilty of a second default, in order to cure a former one. * * * If the money collected or paid over subsequently to the period when the re-

sponsibility of the present defendants commenced, consisted of moneys accruing from the revenue of 1839, and charged against the collector for that year, they are not entitled to the benefit of such payments."

Referring to several cases in the Federal courts, and to Seymour *v.* Van Slyck, he proceeded: "The duties of these Federal and State officers, the collectors of the customs and the collectors of the tolls upon the Erie canal are essentially different from those imposed upon our State, county and corporation collectors; and the mode of transacting their business and settling their accounts is not the same, and it would be a misapplication of the principle settled in the New York and Federal courts to adopt the broad rule contended for by the defendants in this case, that the moneys paid by the collector after the 3d of March, 1840, shall, in the absence of all proof, be presumed to be payments of the revenue of 1840. Indeed it would be impracticable, we think, to lay down any general rule by which a court or jury must in all cases be governed, without regard to circumstances. Cases may be readily imagined in which the operation of such a rule would be as inequitable as the rule which we have declined adopting, in relation to the imputation of payments. A collector, a few days or weeks after the commencement of his second term, and before he has received the tax books of the second year, makes, we will suppose, a large payment, a de-

fault appearing charged against him for the former terms. It would be a violent presumption to suppose that such payment was designed to anticipate a liability not yet created. In such a case, the court would be warranted in applying such payment to the previous indebtedness. So, as in the case of Seymour *v.* Van Slyck, a correspondence between the amount paid in, and the amount charged at a previous settlement, was held such a coincidence as to warrant a belief that the payment was intended to extinguish the charge. It may, however, be soberly said, that we will, in such cases, presume that an officer does his duty, until the contrary appears; and, therefore, that when the officer is in receipt of the revenue of a specified year, and chargeable with it, we will presume, in the absence of all proof on the subject, that payments made during that year are designed to extinguish the liabilities of that year, but in the absence of all proof of intention, payments made in the year 1840, before the collector was charged with the revenue of that year, must fall within the rule adopted in ordinary cases, and the payments be imputed to extinguish the oldest items of indebtedness."

The question came up again in the case of the State, to use of Buchanan Co. *v.* Smith,[1] where Mr. Justice Scott discussed more prominently the power of appropriation by the parties themselves, irrespective of the sureties. "If the collector," he remarked, "at the time he made the payments, gave directions as to the manner

[1] 26 Mo. 226.

in which they were to be applied, those directions will prevail, unless the county treasurer was aware that the moneys received ought not to have been applied as directed. It would not be just that a party should receive money, and knowingly apply it to a purpose which would operate as a wrong to others. If a collector of the revenue meets his creditor, and, with the public money, pays him his debt, who is ignorant as to the source whence the money came, the debt is discharged, and the creditor cannot be made to refund. But if the creditor, knowing that the money does not belong to his debtor, nevertheless prevails on him to discharge his debt, he is guilty of a fraud, and may be compelled to restore the money received to the true owner. So, when there is an account against a collector, and he settles it, without any knowledge on the part of the officer receiving the money that it was not applicable to that purpose, the payment will be good, and no one can disturb it (Colerain *v.* Bell, 9 Metc. 499). If the collector made an appropriation of the money received by the treasurer to the extinguishment of the indebtedness under the first bond, and the money received was due and collected under the last term, yet if the officer who received the payment was ignorant of the fact, and took the money in good faith, the transaction is a valid one, the debt is discharged, and the securities for the term during which the money was due and collected are liable for its misapplication. Although the law, when it falls to its lot to appropriate payments, will not suffer the rev-

enue received under one term to be applied to the satisfaction of a defalcation incurred under another term, when there is a different set of securities for each term; yet, if the officer himself will make the misapplication, and the money is received in good faith by the party to whom the officer is indebted, such misappropriation cannot be avoided, and it will be binding on the sureties for the term during which it was collected. Although there may have been no application of the payment when made, yet the law, in making the application between two sets of sureties, will not presume that all the revenue received after date of the last bond, was received in discharge of the liability incurred by reason of such bond, and inflexibly appropriate it accordingly. At the expiration of the first term an officer may be indebted under the bond of that term. The day after he gives a bond for a second term, with different securities. Before he has time to collect any money due for the last term; before he becomes chargeable under it for any sum, he makes a payment into the treasury, without directions as to the manner in which it shall be applied. Now, it would be unjust to the securities on the first bond to apply this money to the relief of the sureties on the second bond. The circumstances under which a payment is made may show the year for which the money was received with which the payment was made. If, after an officer is properly chargeable with money for a term, he makes a payment, it may be presumed that it

was on account of the indebtedness for that term; yet it may be shown to be otherwise, and the circumstances under which it was made may indicate the source whence the money was obtained. The law is, that if the debtor does not make the application of the payment the creditor may. If it is shown that the creditor has made application of the payment in good faith towards the extinguishment of the prior indebtedness, the sureties on the last bond will be bound by such application. It is only when the law makes the application of the payments that the second set of securities is entitled to the sums that may be shown to have been received under their bond, giving them the benefit of the presumption to which reference has been made as to the time of the receipt of the money."

The Supreme Court of Alabama, in a recent case,[1] examined the question quite thoroughly, and manifested a decided leaning towards the doctrine of the Federal courts. For the first time, in any of the American cases, the few English authorities which bear upon the question with any sort of directness or any reasonable analogy, were marshalled, and their force considered. Mr. Justice Chilton discussed the question as follows: "The question is, can the treasurer, by the consent of the tax collector, apply the funds received as taxes for the year 1847, for the collection of which the present plaintiffs in error were

[1] Boring *v.* Williams, 17 Ala. 510.

bound, to the payment of an indebtedness of the tax collector for taxes collected in 1846, for which other securities were responsible. We confess we have had much difficulty with this question, and this difficulty is, by no means, removed by an examination of the authorities applicable to the point." The learned judge then examined the English authorities, and proceeded: "We think it may be conceded that the English cases show the law to be adverse to the plaintiffs in error upon the point under consideration, and we are free to confess that the reasoning upon which they are based is difficult to overturn. But it is very obvious that they do not attain the justice of the case, for every one must, at once, agree that it is repugnant to the first principles of equity and good conscience to permit an insolvent collector to abuse his trust by collecting moneys for the payment of which, to the treasurer, his sureties are bound, and applying them to the discharge of other sureties who are bound for a previous year's default. We should not, however, permit the hardness of the case to have the slightest influence upon our determination were the law settled in this country in accordance with the English cases to which we have referred." The learned judge here reviewed the earlier cases in the Federal courts, and concluded by saying: "Thus stand the authorities upon the point, and, since it is quite clear that the American cases show a decided leaning in favor of allowing the sureties on the bond of 1847 the benefit of payments made from the

collection of taxes for that year, notwithstanding the treasurer and collector have both consented to apply them to the discharge of the collector's liability for 1846, and, as this view is so much more consonant with the justice of the case, than the contrary, we have, after the most mature deliberation, arrived at the conclusion that the court below erred in refusing to credit them with the $930 20 so misapplied."

We shall terminate this somewhat extended examination of this question upon the authorities, by citing the latest reported case which has come under our observation, and which contains full as many-sided a discussion of it as any of its predecessors. It is the case of Chapman *v.* Com.,[1] in the Court of Appeals of Virginia. The liability of the sureties in a bond for the year 1871, for the sums collected by a tax collector and paid into the treasury before the execution of that bond, was the question, and the court held, Moncure President delivering the opinion, that the evidence warranted the conclusion that the collector and the auditor had concurred in such an appropriation, and that the auditor, at least, had acted in good faith, and that such a disposition of the payments was within the power of those parties without any reference to the rights or interests of the sureties.

The court granted a reargument on this point on the petition of the sureties (some of the positions of which have already been given, page 175), and Mon-

[1] 25 Gratt. 721.

cure President delivered another opinion, containing great thought, upon this question, and evincing a most thorough examination of it. In the course of it he used the following language: "The petitioners seem to suppose that where a receiver of public moneys, appointed for successive periods, gives bonds with different sets of sureties, to account for his collections during those periods respectively, all his payments on account of such money are presumed, in the absence of evidence to the contrary, to have been made with money collected on account of the bond in operation at the time of such payments respectively, and must, accordingly, be applied to the credit of such bond until it is discharged, before they are applied to the credit of any other bonds, and some of the cases, to which they refer, seem to sustain that view. But we think it will be found, on a critical examination of those cases, that the points really decided in them do not, in fact, sustain that view. And, if they do, we are of opinion that they are in conflict with a well settled principle, and are founded on a misapprehension of that principle." The learned judge then examined the cases in the Federal courts, in the Supreme Court and Circuit and District Courts, anterior to the Eckford Case, and proceeded: "Upon the whole, we are decidedly of opinion that the rule is correctly laid down by Mr. Justice Story in the cases decided by him, and that it applies as well to the government as to any other creditor. It is very important to the interest of the government

that the fact should be so, and it is just, we think, to public officers and their sureties. We think the uniform practice in this State has conformed to that construction of the law. It has been very common for the same person charged with the duty of collecting taxes and other money, to be re-appointed to office, and to give new bonds, with different sets of sureties. In such cases we believe the auditor of public accounts has been always in the habit of applying any money paid him on the public account, according to the directions of the person paying it, and in the absence of any such direction, and of any information as to the propriety of a different application, we believe that official has been always in the habit of applying a general payment on account, first to the discharge of the older portion of the account standing on his books against the person making the payment. It would, certainly, be productive of very great inconvenience, if not loss, to the public, or, at least, to the auditor, if it were necessary for him to ascertain, at his peril or at the peril of the public, that every application made by him of every payment made to him on the public account, was such an application of such a payment as was proper to be made in view of the source from which the money was derived, and, in view of the conflicting interests of sureties. The auditor must, of course, act in good faith. * * * * Suppose a private creditor of a sheriff *bona fide* receive of the latter, in payment of the debt, money derived by the

latter from the collection of taxes, not knowing that the money was so derived, would not the act be legal and valid on the part of the creditor? Why is not the effect the same when the creditor is the commonwealth? Is there any reason applying to the former which does not apply to the latter case? Is there not a special reason why the commonwealth and her auditor of public accounts should not be embarrassed with perplexing inquiries in regard to relative and conflicting rights of different sets of sureties of the same public debtor who may offer to make a payment on account of the debt? Does justice to the sureties require that they should thus be taken care of at the expense of so much public inconvenience? They voluntarily became sureties, knowing the nature of their undertaking. They trusted their principal, and enabled him to get the public money into his hands. Why cannot they watch over him and take care that he applies it properly? Certainly, their principal in whom they trusted, and whom they accredited, has it in his power to protect them, at least, against a misapplication of any payment he may make of money collected by him, for he may direct and control the application at the time of payment. * * * If the debts be due by a collector or other receiver of money under bonds with different sets of sureties, the law will so apply the payments, if possible, that the money collected under one bond shall be applied to the relief of the sureties in that bond respectively. And the cred-

itor in such a case, if he be informed as to the source from which the money with which a payment may have been made was derived, cannot apply it otherwise, even with the consent or by the direction of the principal debtor."

It is, of course, impossible to deduce from such a mass of diverse matter, a single clear and succinct rule. It may, however, be confidently asserted that the discussion of the question has resulted in a considerable toning down of the points of disagreement between different judges, and that much less diversity of opinion exists among the courts now than prevailed twenty-five years ago.

That the Supreme Court of the United States will recede from the rule which, after so many decisions it has solemnly settled for the Federal courts, it is, perhaps, too much to expect, and the same may be remarked of the courts of Massachusetts, in regard to their diametrically opposite doctrine.

But of most of the other States, which have not fully committed themselves to any fixed rule, it may be said that a gradual and constant progress has been made towards a similarity of views, lying between these two extreme points, and that the average doctrine or rule of their courts may be formulated as follows:

The right of appropriation of a payment in the principal debtor, in the case of good faith on the part of the creditor receiving it, is as unqualified as in the

ordinary instance of single debtor and creditor, and the same may be predicated of an appropriation in good faith, made by the creditor.

In the case of payments which are unappropriated by either party, the presumption is that they came from the revenues of that year, or term of office during which they were made, and they will be so applied, unless that presumption be rebutted by satisfactory indications or evidence of a contrary fact, in which case they will be appropriated according to the actual truth of the case.

CHAPTER XIII.

MISCELLANEOUS SUBJECTS.

A few topics of minor importance remain to be noticed, which are not strictly reducible under any of the preceding heads.

I.

As to the time when the application takes effect.

This will be the time of the payment, and not the date of the application,[1] which may oftentimes be very wide apart, especially in cases of the application being made by the court in the course of a protracted litigation.

II.

As to pawns and mortgages.

The civil law devoted a space to this subject, and defined the rights of both parties with considerable particularity (*ante*, page 8).

No such prominence is assigned to it, however, under the common law.

The writer of the learned note to Pattison *v.* Hull,[2]

[1] Ramsay *v.* Warner, 97 Mass. 8.

[2] 9 Cow. 747.

at page 777, says, that the proposition that a payment on pawns and mortgages, for simultaneous debts, shall be distributed between the two debts, has never been exactly adjudged with us, and Judge Story, in his treatise on Bailments,[1] takes occasion to remark that few cases have arisen upon this subject in the common law, and that it would be unsafe to rely wholly upon the civil law as furnishing safe analogies for our guidance.

But there are a few cases which contain the principle, or, at any rate, a principle nearly analogous to it.

There is an old case in Lord Nottingham's time, which comes quite close to it. A. was indebted by bond (in which J. S. was bound as surety), and also by simple contract to B. A. stated an account of both debts with B., and made a bill of sale for securing the balance, which proved deficient. On a bill by the surety, *decreed* that the money arising by the bill of sale should be applied towards discharge of both debts in proportion.[2]

The doctrine of this case was quite lately recognized in the Supreme Court of New York,[3] by a ruling to the effect that where the manifest intent of the parties to a mortgage was to provide a security for all the debts of the mortgagor, as, if contracted at the same time, they must share ratably in the fund real-

[1] Story on Bail. § 313.

[2] Perris *v.* Roberts, 1 Vern. 34.

[3] Bridenbecker *v.* Lowell, 32 Barb. 9.

ized from the security, without regard to priority of date.

A similar principle, it is conceived, runs through an old Massachusetts case, wherein it was adjudged that if an insolvent debtor assigns his property for the benefit of such of his creditors as become parties to the assignment, and thereby release their claims, and a dividend is received by one of such creditors, it must be applied ratably to all his claims against the debtor, as well to those upon which other parties are liable or which were otherwise secured as to those which are not so secured.[1]

These cases seem to be referable to the principle that when a debtor, either by himself alone or in connection with his creditor, provides a fund for the payment of all his debts, or those specified in the instrument, *upon the basis of being simultaneous debts*, they shall share ratably in the proceeds of the fund.

The following cases from Mississippi also fall, we take it, under the influence of this principle.

Thus, where a mortgage was executed on real estate to secure the payment of several different notes, some of which were indorsed by accommodation indorsers, and after all the notes had fallen due a bill was filed to foreclose, the court ordered that the proceeds of the mortgage should be applied to the notes *pro rata*, and refused to direct an application in full

[1] Com. Bk. *v.* Cunningham, 24 Pick. 270.

payment of the first note, although the first note was secured by an accommodation indorser.[1]

So, where several notes, maturing at different periods, are secured by a deed of trust and have past maturity, and a sale takes place, under the trust, of the trust property, the proceeds of the sale are to be applied ratably to the several notes.[2]

A doctrine, at first blush, at least, seemingly very different from the foregoing, is to be found in a case from Ohio,[3] where it was held that different debts, secured by the same mortgage, were to be paid from the mortgage fund in the order in which they fall due. The court said it was the same as if the mortgage had been given to secure a certain sum in installments.

Upon the assumption that in this case there was not only not an intention evinced by the debtor, nor by the parties, that the debts should be treated as simultaneous, but quite the reverse, the position of the court ought not to be considered as irreconcilable with the preceding rulings, but to present the ordinary case of priority of pledges under the civil law.

This doctrine is not applicable to a fund not created by, nor produced from any act of, the debtor, but resulting from process of law.

[1] Parker *v.* Mercer, 6 How. 320.

[2] Cage *v.* Iler, 5 S. & M. 410.

[3] Bk. of U. S. *v.* Singer, 13 Ohio, 240.

Thus, a plaintiff having two executions, which are liens for money, in the hands of the sheriff, arising from the sale of the defendant's property, cannot apply the funds to either *fi. fa.* at his option, but the law will appropriate the proceeds of the debtor's property to the older lien.[1] Lumpkin, J., in the course of his opinion, said that the general principle was, that a fund in the hands of the agents or officers of the court, and raised by legal process, would always be appropriated to the liens upon it agreeably to their seniority.

In the case of a creditor holding a collateral security directly from the debtor, and as a personal and private transaction, he may make any such appropriation of the proceeds thereof as best subserves his interests, provided it be one to which the debtor could not object as an act of injustice to him.

Thus, it is familiar law, in the law of bankruptcy, that where a security has been deposited with a creditor, generally, and the debtor afterwards becomes bankrupt, owing the creditor two debts, one of which is provable and the other not, the creditor may appropriate the security to the debt which is not provable.[2]

In the case last cited (*Ex parte* Johnson), Lord Chancellor Cranworth said, that the doctrine of the

[1] Newton *v.* Nunnally, 4 Geo. 356.

[2] *Ex parte* Hunter, 6 Ves. 94; *Ex parte* Howard, 1 Cooke's Bankrupt Laws, 147; *Ex parte* Arkley, 1 Id. 189; *Ex parte* Johnson, 3 De Gex, M. & G. 218.

court was clear, that the creditor holding a security was entitled to apply it in discharge of whatever liability of the bankrupt he might think fit.

Extending the power here mentioned to the creditor, the Supreme Court of Massachusetts, in an early case, ruled that when one having a mortgage made to secure a debt due to himself, and another debt due to a third person, engaged that when he could, by any sale or appraisement of the mortgaged premises, realize a sum equal to both the debts, he would dispose of the same and apply the proceeds to the payment of the debt to said other creditor, and afterwards sold the premises for the most they would fetch, but not for enough to pay both debts, he might, lawfully, first satisfy his own claim, and pay the residue only to the creditor.[1] Chief Justice Parker gave the following construction to the mortgage: "Now, it is our opinion that, from the terms of the contract, it is to be understood that if the proceeds of the sale should be equal to the sums due on the two notes, then the plaintiff was to be paid in full. But as there is no stipulated appropriation in case the proceeds should fall short, we must consider the defendant as holding the pledge entitled to satisfy his own demand, and obliged to pay over the surplus only to the plaintiff, the true construction of the agreement being that the defendant would pay over whatever should remain after satisfying himself, his own debt."

[1] Marshall *v.* Bryant, 12 Mass. 321.

Still later it has been held, in the same State, that if a creditor holds collateral security on personal property for various notes, some of which also bear the names of sureties, he may, in the absence of any stipulation to the contrary, apply the proceeds of the collateral security so as best to protect his own interest, and is not bound to apply such proceeds, in the first instance, to those notes having sureties upon them,[1] the court saying, that, owing to the insolvency of the parties to the notes on which application had been made, nothing could be collected on them, and without such application they would remain wholly unpaid.

But, as before remarked, the creditor is under obligation to make an appropriation not unjust to the debtor, as, for instance, not to compel him to pay other people's debts in preference to his own.

Thus, where a creditor had a mortgage to secure two or more notes, on some of which the mortgagor was principal alone, and on another of which he was joint principal with another person, the court said that he could not apply the proceeds of a sale of the mortgaged premises in payment of the whole of the note, in which the two were joint principals, to the prejudice of the sureties on the other notes, that the law would apply the property, in the first place, to the payment of the actual debt of the mortgagor.[2]

[1] Wilcox *v.* Fairhaven Bk. 7 Allen, 270.

[2] Merrimack Co. Bk. *v.* Brown, 12 N. H. 320.

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